AUG 21 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1953
No. 282

J. B. LONDONO,

Petitioner,

vs.

CITIZENS NATIONAL TRUST & SAVINGS BANK OF LOS ANGELES, DULIEN STEEL PRODUCTS, INC., OF CALIFORNIA and DULIEN STEEL PRODUCTS, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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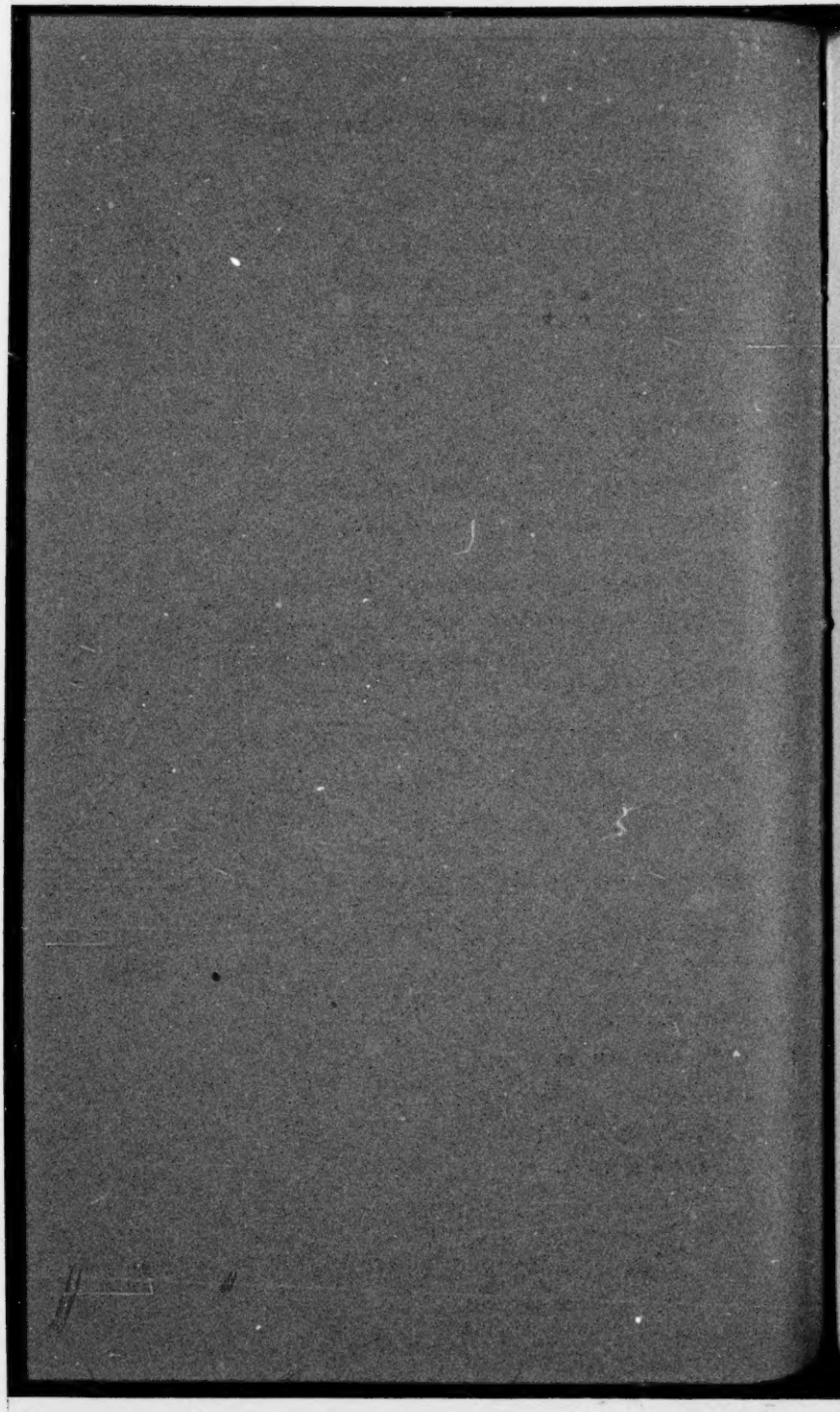

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ERRATA IN PETITION FOR WRIT OF CERTIORARI

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PEALS FOR THE NINTH CIRCUIT.

To the Honorable the Chief Justice and the Honorable the Associate Justices of the Supreme Court of the United States:

Your petitioner, J. B. Londono, respectively prays that a writ of certiorari be issued out of and under the seal of this court to review the decision of the United States Court of Appeals for the Ninth Circuit, which reversed a judgment of the United States District Court for the Southern District of California, Central Division, in favor of petitioner and against the respondents.

The petitioner, who was plaintiff in the District Court and appellee in the Court of Appeals for the Ninth Circuit, will be sometimes referred to herein as "the buyer" or "Londono"; defendants Dulien Steel Products Inc., and

Dulien Steel Products Inc., of California, the sellers of the merchandise, will be referred to jointly as "the seller" or "Dulien," and sometimes designated for simplicity by the singular personal pronouns; Citizens National Trust and Savings Bank of Los Angeles as "the Bank"; and Matson Navigation Company as "Matson."

Opinions Below.

The opinions of the Court of Appeals are printed in the record [R. 3487-3496] and are reported at 204 F. 2d 377.

The opinion of the trial court is printed in the record [R. 3029].

Jurisdiction.

Jurisdiction to review the instant case on a writ of certiorari is conferred upon this court by Tit. 28, U. S. C., Section 1254(1).

The judgment of the Court of Appeals was entered March 30, 1953 [R. 3498]. Petition for a rehearing and for a rehearing *en banc,* timely filed, was denied on June 24, 1953 [R. 3498]. An order was made by that court staying the mandate until August 24, 1953, pending the filing of this petition for certiorari.

Statutes.

[Statutes in addition to those printed in the text or footnotes of this petition]:

> Calif. Civ. Code, Sec. 1625. *Effect of written contract.* The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument.

Calif. Code Civ. Proc., Sec. 1856. *An agreement reduced to writing deemed the whole.* When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases:

1. Where a mistake or imperfection of the writing is put in issue by the pleadings;

2. Where the validity of the agreement is the fact in dispute.

But this section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in section eighteen hundred and sixty, or to explain an extrinsic ambiguity, or to establish illegality or fraud. The term agreement includes deeds and wills, as well as contracts between parties.

Calif. Code Civ. Proc., Sec. 1860. *The circumstances to be considered.* For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret.

Calif. Civ. Code, Sec. 1789. *Remedies for breach of Warranty.* (1) Where there is a breach of warranty by the seller, the buyer may, at his election:
. . .

(b) (*Damages.*) Accept or keep the goods and maintain an action against the seller for damages for the breach of warranty . . .

(6) (*Measure of damages.*) The measure of damages for breach of warranty is the loss directly and naturally resulting in the ordinary course of events from the breach of warranty.

(7) In the case of breach of warranty of quality, such loss, in the absence of special circumstances showing proximate damage of a greater amount, is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

Tit. 28, U. S. C., Federal Rules of Civil Procedure.

Rule 2. One Form of Action. There shall be one form of action to be known as "civil action."

Rule 8(a). Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

Rule 54(c). Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

Summary Statement of the Matter Involved.

The record carried before the Court of Appeals contained approximately 3,500 pages; many questions of law were raised by the appellants, not treated by that court. We have studiously and assiduously endeavored to compress this petition into the smallest possible compass and, while regretting and making amends for its length, humbly urge upon the Supreme Court that in dealing with two causes and two opinions it would have been impossible for us to write intelligibly with greater brevity and make our reasons clear.

The Court of Appeals for the Ninth Circuit wrote two short opinions: One by District Judge Harrison, concurred in by Chief Judge Denman and Judge Healy; and one by Chief Judge Denman, concurred in by Judge Healy. The reversals were not upon a review of the evidence; on all the issues the findings of fact by the trial court stand, in the opinions, unquestioned and unassailed. The opinion of Judge Harrison deals essentially with the Dulien appeal. The opinion of Chief Judge Denman deals exclusively with the Bank's appeal.

Addressing ourselves to the opinion of Judge Harrison, here were the salient facts: The plaintiff Londono bought from defendant Dulien, at Los Angeles, a large shipment of barbed wire, for resale in South America [R. 165]. The wire being then in transit from Hawaii, by Matson Navigation Company steamship, inspection was impossible [R. 125]. The purchase was induced by Dulien's fraudulent oral representations of good quality, and the simultaneous exhibition of sample wire "like new" [R. 124-

128], relying upon which Londono signed a "sale order" [R. 126], containing a sketchy, uncertain description of the merchandise [R. 360, 361; 127] reading, to wit: "Unused government surplus barbed wire, as purchased by seller from Interior Department" [R. 126; 31]. The wire, upon arrival, was of low grade, badly rusted and much of it unsalable except at junk prices [R. 146, 147]. The defendant Bank, in flagrant violation of the terms of a letter of credit purchased by Londono, and without Londono's knowledge of the condition of the wire, paid Dulien, under said letter, $214,000.00, the agreed purchase price of the wire [R. 135, 136; 151]. Unable to get any of his money back from Dulien, Londono kept the wire and, to mitigate the loss, sold it at the best prices obtainable on the market [R. 152, 153; 135, 136], and sued Dulien for damages. His complaint alleged, as against Dulien, the entire transaction and all the elements of fraud, and prayed damages for breach of warranty under the rule declared in Calif. Civ. Code Section 1789(7) [R. 3-37]. The District Court, in a long trial, ruled that the language of the sale order was uncertain and ambiguous, that it did not express the entire agreement [R. 360, 361; 127], and that Dulien's representations of the condition of the wire were false, and fraudulently made [R. 125, 126, 131, 135, 136, 139, 147], and refused to strike the parol evidence and the samples by which the certainty of the contract and the fraud has been established—to which evidence timely objection had been made [R. 1974-1983]. It made findings to the effect that the purchase contract had been induced by fraud [R. 206], to-wit, a fraudulent warranty engendered by false oral statements of quality and false samples [R. 125, 126, 131] and rendered judgment for Lon-

dono against Dulien, measured as for breach of warranty, in the net amount of $236,355.51 [R. 194-202].

On appeal by Dulien, the Court of Appeals, in reversing the judgment, held that the parol (or extrinsic) evidence was properly received by the trial court for the purpose of "identifying the subject matter" and for "showing the quality of goods agreed to be sold" and for "clarification of the terms of the agreement," but was incompetent to "add a warranty" to the writing; that Londono's case was not "predicated on fraud" and, impliedly, that for such reason all the evidence of fraud should have been stricken.

[The opinion of Judge Harrison does not deal with the Bank's obligation to Londono on the letter of credit, however it reverses the judgment as to *all* the defendants.[1]]

We respectfully submit that the error of the Court of Appeals was multiple. [1]: The California rule excluding parol evidence has never applied to a contract induced by fraud. (In the instant case the contract was induced by fraud.) [2]: Under the California rule if, in proving by

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[1]Plaintiff also sued Matson Navigation Company upon the ground that it had knowingly and illegally transported rusty, unmerchantable wire on a "clean, on-board, order" bill of lading (forbidden by the laws of the United States, and making the navigation company liable to Londono as assignee or transferee of the bill of lading), and on the assumption that the Bank had obtained such "clean, on-board, order" bill of lading from Dulien upon payment of the $214,000.00; but Matson subsequently revealed that the bill of lading issued by Matson to Dulien in Hawaii—but not an "on-board, order" bill of lading—had been surrendered by Dulien to Matson before Dulien demanded and got the money from the Bank, and was cancelled, filed and lost in Matson's office—none of which was known to Londono until shortly before the trial commenced; and the Bank having failed to demand, and neither it nor Londono ever having received, from Dulien any bill of lading, it suffices to say that the cause of action against Matson failed.

parol evidence that fraud induced the contract of purchase, it appears that the inducing factor was a fraudulent oral warranty, the buyer may rely upon *that warranty* instead of any defective or imperfect warranty in the writing. (In the instant case the buyer relied upon the fraudulent oral warranty.) [3]: Whether the sale involves fraud of the seller or not, where the writing contains uncertain, or doubtful and ambiguous, descriptive words of character or quality, parol evidence of antecedent and contemporaneous statements by the parties is admissible to make clear and certain the meaning in which the words were used in the writing, thus fixing the character or quality of the merchandise upon which the parties contracted. [4]: Whether the sale involves fraud of the seller or not, where the writing contains no warranty, or contains skeletal language not inconsistent with the seller's inducing affirmations of character or quality, such affirmations may be proven by parol and, if relied upon by the buyer, become by force of the California statute express warranties. (In the instant case the affirmations of quality by the seller were relied upon by the buyer.) [5]: It was fraud that induced the contract in the instant case: except for the seller's fraudulent affirmations of quality, the buyer would not have signed the sale order, and having been damaged by the seller's fraud he had an action therefor. (This regardless of whether or not the fraud begot a *warranty*—which we submit it did, however; the trial court took, but the Court of Appeals rejected, as its rule of decision, the California substantive law on proof of warranties.) [6]: The circumstance that the buyer's complaint was entitled "For Breach of Warranty," and that he prayed damages as for breach of war-

ranty, did not affect in the slightest his right to damages suffered because of the *fraud;* contrary to the opinion of the Court of Appeals, his action *was* "predicated on fraud"; the facts of the transaction, including all the elements of fraud, were pleaded, proven and found, and he was entitled to his damages on the case as made. Forms of pleading *ex contractu* and *ex delicto,* and concordant prayers, have been abolished by the Federal Rules of Civil Procedure.

Referring now to the opinion of Chief Judge Denman, the salient facts were these: Londono purchased from the Bank a $214,000.00 letter of credit in Dulien's favor, and paid the Bank said amount therefor, plus the Bank's service charge of $535.00 [R. 133, 167].[2] By the terms of the letter [R. 34; Ex. 5], the $214,000.00 was to be disbursed by the Bank to Dulien upon Dulien's delivering to the Bank for Londono a "full set clean, on-board, ocean bills of lading, made out to order, blank endorsed, marked freight prepaid." The Bank gave Dulien the $214,000.00 without obtaining *any* bill of lading whatever [R. 135]. The low-grade, rusty wire was unloaded from the ship and Dulien, having pocketed the money, would not take back the wire nor adjust the price. Londono was obliged to keep the merchandise and sell it at the best price he could get on the market, to mitigate the

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[2]In this transaction he deposited, as cash, with the Bank a foreign letter of credit for $160,000.00, and borrowed of the Bank $54,535.00 for which he executed his promissory note, the proceeds of which loan were covered into his commercial checking account at the Bank, against which he drew a check in an equal amount, to pay for the letter of credit, and the service fee.

damage [R. 135, 136; 152, 153]. He sued the Bank, reducing his claim at the end of the trial to the full amount of the money unlawfully disbursed by it, less the net proceeds of the salvage sales, which proceeds the trial court, in giving judgment, offset against the Bank's liability, as also the balance owing on Londono's promissory note [R. 184, 185]. The judgment was for the net amount of $120,312.88 [R. 197].

On appeal by the Bank, the Court of Appeals, in reversing the judgment, treated the sale and issuance of the letter of credit by the Bank as though it were a nude pact, held that the $214,000.00 delivered to Dulien was the Bank's own money, and "that the major provision of the letter of credit, the delivery of the prescribed bill of lading, was impossible of performance," it appearing "that no negotiable bill of lading 'made out to order and blank endorsed' was issued for the wire agreed to be sold to Mr. Londono" . . .; that Londono "rejected" the wire and "the case was tried and decided below on grounds which [made] irrelevant any questions concerning the bill of lading or any act of the Bank."

This conception of a letter of credit and the Bank's obligation thereunder was error [7] because—First: An irrevocable letter of credit, purchased and paid for, is a solemn contract supported by a full consideration,—in this case the consideration moving from Londono to the Bank was $214,535.00, and the consideration flowing to

Londono from the Bank was the obligation undertaken by the Bank. Second: The dry question of whether *title* to the money was in the Bank when disbursed is immaterial, because the credit of $214,000.00, upon which the Bank issued the letter, was paid for by Londono. Third: The impossibility of performance, because a clean, on-board, order bill of lading was non-existent, did not excuse the Bank for paying out the money contrary to instructions—it should have held the money for return to Londono. Fourth: The act of the Bank in disbursing the money made it liable instanter to Londono for the whole amount, and he was damaged in said amount, lessened only to the extent of the net market value of the merchandise received and sold in mitigation.

Reasons Relied on for Issuance of the Writ of Certiorari.

I.

The Court of Appeals decided an important question of local law in a way conflicting with applicable local [California] decisions. The California courts have settled and established two distinct and different rules with relation to the competency of parol evidence in proving sale warranties: the first for non-fraud cases, and the second (an exception to, or corollary of, the first) for fraud cases. The decision herein recognizes the non-fraud rule only, and applies it to a fraud case, ignoring and treating the applicable rule of decision as non-existent.

Exposition of First Reason.

The opinion of the Court of Appeals, written by Judge Harrison, subverts the duty of Federal District Courts to apply the law of California, on which this case turned, by treating the written memorial of a sale of goods, ***induced by the seller's fraudulent oral warranty,*** as subject to the rule that no warranty can be made out or added by extrinsic evidence; whereas, the California Supreme Court has declared it well settled that a writing may be impeached for fraud, and a parol warranty really made may then be relied upon; that the parol evidence rule was never intended for use as a shield to prevent the proof of fraud, and that fraud may always be proved by parol. This rule the trial court followed, but the Court of Appeals ignored it.

If the instant decision of the Court of Appeals stands, all written contracts involving warranties, justiciable in the Federal Courts in California, will be controlled by the first rule, *supra*. That is to say, the *prohibitory part* of the parol evidence rule will govern the trial of sales-on-warranty cases in said Federal Courts, and the *entire* rule, with its corollaries and exceptions, will appropriately govern such cases tried in the State courts—thus throwing the law into uncertainty and confusion and evoking a mutual repugnance where its enforcement by Federal District Courts in California must follow one rule in fraudulent warranty cases, leaving the State courts to follow another, with resulting divergent remedies and unequal justice.

This is a matter of wide and general interest. It is important to the public and to litigants and to the comity of courts that equal rights and equal justice be available whether the litigation arise in the Federal or the State courts.

II.

The Court of Appeals has decided an important question of Federal law, to wit, a question governed exclusively by the Federal Rules of Civil Procedure, in a way which conflicts with applicable decisions of the Courts of Appeals in other Circuits, and has departed from the accepted and usual course of judicial procedure.

Exposition of Second Reason.

In reversing the judgment the opinion holds that "If Londono had been defrauded his action would have been predicated on fraud, a tort, not upon a breach of warranty, an action on a contract."

The opinion and decision thus has the effect of nullifying, in California, and perhaps the 9th Circuit, Federal Rules of Civil Procedure 2, 8(a) and 54(c), and of denying appropriate relief, on the facts pleaded and proved, when the cause of action is not formalized "in contract" or "in tort," even though the entire fraudulent transaction (as here) has been set out in the complaint and the facts fully proved and found.

This deprivation of plaintiff's right not only results in a grave injustice in the case at bar, but is of general in-

terest, because the opinion amounts to a judicial pronouncement initiating a return of the Federal Courts in California, indeed throughout the 9th Circuit, *to the old rules of practice and procedure in the State courts,* whereunder the allegations of the complaint must sound in tort or else in contract, and the plaintiff seek and be bound by the prayer for a specific remedy and measure of relief, at the peril of reversal on appeal.

The same reason applies to the opinion and decision reversing the judgment against the Bank, where among other matters the Court of Appeals says: "Nor has Mr. Londono sued the Bank . . . on the ground of total absence of consideration or mutual mistake."

III.

The decision of the Court of Appeals is in conflict with the principles universally applied to banking transactions, and in conflict with the decisions of Courts of Appeals in other Circuits, and those of the Supreme Court of the United States, upon the obligation of banks under letters of credit.

Exposition of Third Reason.

The opinion regards an irrevocable letter of credit as lacking consideration, and has the effect of making the conditions of disbursement in letters of credit, purchased of banks in the Ninth Circuit, unobligatory upon the bank, on the theory that the bank in paying out the money thereunder is using its own borrowed funds, as though they

were customers' deposits; it effectively holds that the purchaser thereof has no action for damages where the money is disbursed in violation of the letter's terms, if the bank's obligation under the letter is incapable of fulfillment; and that although the money may be so disbursed, the bank is absolved, and the question of its duty becomes irrelevant, if the purchaser "rejects" the merchandise, a specific bill of lading for which was required as the strict condition of disbursement.

This decision interrupts the hitherto unbroken current of authority flowing from both Federal and State jurisdictions. It is of the highest importance to the mercantile community doing business with banks, and to the general public's confidence in the banking fraternity itself, that the sanctity and obligation of letters of credit—on the faith of which incalculable sums are handled daily—be uniformly recognized and enforced. The results of applying a different rule to letters of credit in the 9th Circuit would be widespread and calamitous.

It is fundamental to the further proper conduct of the case that the Supreme Court control and correct the decision of the Court of Appeals for the governance of the trial court herein. That such a course may be necessary was declared in *United States v. General Motors Corp.*, 323 U. S. 373, 89 L. Ed. 311, 318, where a writ of certiorari was granted for that reason and purpose.

Questions Presented.

Question No. 1 [The prohibitions and the permissions of the California parol evidence rule are equally rules of decision.]

Where the highest court of California has laid down two separate and distinct rules of law to be respectively applied in proving warranties in the sale of goods—one excluding parol evidence where fraud is not involved, and the other permitting parol evidence to prove a fraudulent warranty which induced the buyer to make the contract[3]—are not the Federal District Courts bound, under U. S. C. Tit. 28, Sec. 1652,[4] to apply the law of the State of the forum which would be applied by the State courts were the matter properly before them?

Question No. 2 [Wrong State rule on proving fraudulent warranties imposed on Federal trial courts.]

Where the writing purports to be a complete sale agreement (whether containing a defective, or not containing any, warranty), and the buyer is induced to sign it by the seller's fraudulent oral representations of quality (which under the California Supreme Court decisions constitute an express warranty),[5] does not the Court of Appeals, in reversing the trial court for having applied the California

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[3]*Ferguson v. Koch*, 204 Cal. 342, 268 Pac. 342, clearly states and elaborates both rules; see also *Germain v. Armsby*, 153 Cal. 585, 96 Pac. 319, on which the appellate court grounded its decision.

[4]U. S. C. Tit. 28, Sec. 1652. "State laws as rules of decision. The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

[5]*Ferguson v. Koch*, 204 Cal. 342, 268 Pac. 342 (fraudulent oral warranty may be relied upon); followed in *American Soda Fountain*

rule of law admitting parol evidence of such fraudulent warranty, lay down, for use in the Federal District Courts, a rule in direct conflict with that applied by the California State courts in similar cases, and thus ignore and violate the provisions of U. S. C. Tit. 28, Sec. 1652?

Questions Nos. 3, 4 [Parol evidence to "show quality of wire" and to "clarify terms of agreement" *ipso facto* evokes State warranty statute.]

(a) Where the language of the sale order sketchily described the merchandise in the words, "Unused government surplus barbed wire, as purchased by seller from Interior Department," ruled by the trial court to be uncertain, ambiguous language of character and quality, and for the interpretation of which[6] it admitted parol evidence to *show the quality of the wire,* and to *clarify the meaning of the writing* upon which the parties contracted [R. 360, 361], did not the Court of Appeals, in holding extrinsic evidence admissible for the purpose of "showing the quality of the wire agreed to be sold" and "clarification of the terms of the agreement," recognize said quoted description in the sale order as being uncertain and ambiguous, *precisely as did the trial court?*

(b) Did not, therefore, such properly admitted clarifying evidence, which included the seller's affirmations of

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Co. v. Martin, 100 Cal. App. 43, 279 Pac. 680, 682. See *Morris v. Harbor Boat Bldg. Co.,* 112 Cal. App. 2d 882 [hearing denied by Supreme Court], 247 P. 2d 589 (false representations of capacity, though outside the writing, properly pleaded).

[6]*MacIntyre v. Angel,* 109 Cal. App. 2d 425 [hearing denied by Supreme Court April 25, 1952], 240 P. 2d 1047; *Bartel v. American Dental Supply Co.,* 114 A. C. A. 905 [hearing denied by California Supreme Court, Feb. 11, 1953], 251 P. 2d 16, 17; *Union Oil Co. v. Union Sugar Co.,* 31 Cal. 2d 300, 188 P. 2d 470, 472.

quality that induced the contract, of necessity and by force of the California statute,[7] prove a *warranty* of that quality (which the Court of Appeals expressly held the extrinsic evidence incompetent to do)?

Question No. 5 [Damages for fraud proper though warranty, as such, not proven.]

Where a sale, and acceptance of a written purchase order, were induced by the seller's fraudulent oral affirmations of quality (admitting *arguendo only* that the affirmations did not engender a warranty, as such, under the California statute), and the seller suffered damage by the fraud worked upon him, was he not entitled to judgment therefor, regardless of the circumstance that the trial court not only found that fraud induced the contract, but also found that it begot a *warranty?*[8]

Question No. 6 [Titles, theories and forms of pleading abolished in favor of plain statement, and relief on case as made.]

(a) In a case where the plaintiff pleaded and proved (and the trial court found) the facts of the entire transaction, including all the elements of fraud, but the complaint

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[7]Cal. Civ. Code Sec. 1732: "Definition of expressed warranty. Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. . . ."

[8]*Hodgkins v. Dunham*, 10 Cal. App. 690, 103 Pac. 351, 359 (no warranty in contract, action not for breach, but damages awarded for the fraud). [Note: Court of Appeals held there was no warranty in the instant writing.] *Bagdasarian v. Gragnon*, 31 Cal. 2d 744, 192 P. 2d 935 (dealing with right to recover for fraud, and damages). *Colt v. Freitas*, 76 Cal. App. 278, 244 Pac. 916; *Hunt v. Field, Inc.*, 202 Cal. 701, 703, 262 Pac. 730, 731 (parol evidence proper though writing purports to contain entire agreement).

was entitled "For Breach of Warranty," can the Court of Appeals properly hold, in justifying or rationalizing its reversal of plaintiff's judgment, that his action was "upon a breach of warranty, an action on a contract," and not "predicated on fraud, a tort"?—citing certain California decisions—when the pleadings, trial and judgment were governed by the Federal Rules of Civil Procedure and not by the rules of State practice.[9]

(b) Have not Rules 2, 8(a) and 54(c), Federal Rules of Civil Procedure, 28 U. S. C., swept away and superseded the artificialities of formal theories and prayers, substituting a plain statement of the claim, justifying appropriate relief on the case as made?[10]

(c) Shall a plaintiff be deprived on appeal, in the face of Rules 2, 8(a) and 54(c), of the fruits of his judgment on the case as made, because of the title of his complaint or the language of the prayer?

Question No. 7 [Bank letter of credit, conditioning disbursement, is a contract of inviolable obligation.]

Where a national bank issues to its customer a $214,000.00 letter of credit, fully paid for by the customer, plus a bank service fee of $535.00, disbursement under which letter is conditioned upon the bank's obtaining, for the customer, a specific bill of lading from the

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[9]*Mutual Benefit etc. v. Thomas,* 123 F. 2d 353; *Dallas Ry. Co. v. Sullivan,* 108 F. 2d 581; *Lochman v. Penn. Greyhound Lines,* 160 F. 2d 496.

[10]*Keiser v. Walsh* [Ct. App. Dist. Co. 1941], 118 F. 2d 13, 14; *Kansas City St. L. & C. R. v. Alton R. R. Co.* [7th Cir., 1941], 124 F. 2d 780, 783; *U. S. v. Zara Contr. Co.* [2d Cir. 1944], 146 F. 2d 606, 609; *Garland v. Garland* [10th Cir. 1947], 165 F. 2d 131, 133.

payee of the letter, and the bank thereafter turns over to the payee the $214,000.00 without obtaining such document, can the bank escape liability to its customer for the money disbursed under the letter,—

(a) Upon the claim that the money was its own, and not the customer's, assimilating such payment to use by the Bank of its general deposits as borrowed funds?

(b) Or, upon the claim that fulfillment of its obligation to obtain the prescribed bill of lading was impossible because the document was non-existent?

(c) Or, upon the claim that, although the money was so disbursed, the bank is absolved and the question of its duty becomes irrelevant because the purchaser "rejected" the merchandise [such "rejection" having been in the sense of refusing to recognize the merchandise as that called for in the bill of lading exacted by the letter of credit]?

(d) In sustaining such claims, did not the Court of Appeals depart from the universal rules governing banks, as approved by the Supreme Court of the United States, and enforced by the other Federal Circuits and the State Courts throughout the nation?[11]

We now specify *seriatim* the errors underlying the Reasons elsewhere stated, for issuance of the writ of certiorari:

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[11] *Laudisi v. Am. Exg. Natl. Bank*, 146 N. E. 347, 239 N. Y. 234; *Arctic Ice & Coal Co. v. Southgate* [4th Cir.], 287 F. 48, 50; *Moss v. Old Colony Trust Co.*, 140 N. E. 803, 246 Mass. 139; *Crocker First Natl. Bank v. DeSousa* [9th Cir.], 27 F. 2d 462; *Banco Nacional v. First Natl. Bank of Boston*, 289 F. 169, 175; *J. H. Raynor and Co., Ltd. v. Hambros Bank*, Court of Appeal, reported in the Times Law Reports of Friday, November 13, 1942, and found in Volume 58-59, 1941-43, of Times Law Reports; Zollman on Banks and Banking, Vol. 8, p. 30, Sec. 5132.

Specifications of Error.

In the opinion of District Judge Harrison, which deals essentially with the Dulien appeal:

[*Error No. 1*] The Court of Appeals erred: In applying to this case, involving a fraudulent inducement and fraudulent warranty of quality, the California rule of *Germain Fruit Co. v. Armsby,* 153 Cal. 585, 96 Pac. 319 [citing *Harrison v. McCormick,* 89 Cal. 327, 330, 26 Pac. 830; *Gardiner v. McDonogh,* 147 Cal. 313, 81 Pac. 964], in which it was held that where a written contract of sale is silent as to warranty of the merchandise, and contains no reference to samples exhibited, parol evidence is inadmissible to add a warranty; and erred in holding, accordingly, that the District Court's finding of a warranty in the instant case was without competent evidence to support it. [See brief argument on this specification at p. 23, *infra.*]

[*Error No. 2.*] The Court of Appeals erred in holding that no warranty could be proven by parol—although the trial court found that the warranty relied upon in the instant case was a fraudulent oral warranty that replaced, or made certain as to meaning, the defective and uncertain words of quality in the writing, and which induced the buyer to make the deal and sign the sale order. [See brief argument on this specification at pp. 24-26, *infra.*]

[*Errors Nos. 3, 4.*] The Court of Appeals erred in holding that "The contract of sale . . . upon its face purported to be a complete agreement covering the sale of 'unused government surplus barbed wire, as purchased by the seller from Interior Department' "; that while extrinsic evidence was *admissible* to "identify" the wire, to show "the quality of the wire agreed to be sold," and to "clarify the terms of the agreement," such evidence of the seller's "fraudulent representations" was *inadmissible,* as "it had the effect of adding to the written contract a warranty." [See brief argument on this specification at pp. 26-27, *infra.*]

[*Errors Nos. 5, 6*] The Court of Appeals erred in reversing the judgment against Dulien upon the implied erroneous ground and theory that plaintiff's action was one "upon a breach of warranty, an action on a contract," and that if he "had been defrauded his action would have been predicated on fraud, a tort," thus depriving plaintiff of the fruits of his judgment because his complaint was entitled "For Breach of Warranty" and he prayed for damages measured under California Civil Code Section 1789 (*7*). [See brief argument on this specification at pp. 28-31, *infra.*]

In the opinion of Chief Judge Denman, which deals exclusively with the Bank's appeal:

[*Error No. 7*] The Court of Appeals erred: (1) in its conception that the sale and issuance of a letter of credit by the Bank was *nudum pactum;* (2) in holding that the $214,000.00 disbursed to Dulien under the letter of credit was the Bank's own money and not Londono's; (3) in holding the Bank exempt from liability for failure to obtain the prescribed documents demanded by the letter of credit because, the documents being non-existent, the performance of its obligation was impossible; (4) in ruling that no acts of the Bank were shown to have damaged Londono; and that he "rejected" the wire, thus making "irrelevant any question concerning the bill of lading or any act of the bank." [See brief argument on this specification at pp. 32-37, *infra.*]

[*Error No. 8*] The Court of Appeals erred in denying Londono his right to recover from the Bank because he had not "sued the Bank to recover the $160,000.00 and the return of his promissory note on the ground of total absence of consideration or mutual mistake." [See brief argument on this specification at p. 37, *infra.*]

Argument on Specifications of Error.

[*Argument on Specification of Error No. 1, supra.*]

The Court of Appeals was in error, because the *Londono* case was permeated with fraud. The *Germain* case, *supra* (153 Cal. 585, 96 Pac. 319), did not involve fraud, and the rule therein laid down does not apply and never has been applied to fraud cases; neither was fraud mentioned in the *Harrison* case, *supra* (89 Cal. 327, 26 Pac. 830), and no fraud was claimed to have induced the contract in the *Gardiner* case, *supra* (147 Cal. 313, 81 Pac. 964). The case of *Yuba Manufacturing Co. v. Stone,* 39 Cal. App. 447, 179 Pac. 418, cited as supporting authority for its opinion by the Court of Appeals, contains language which was specifically declared *not to be the law* by the Supreme Court of California in *Ferguson v. Koch,* 204 Cal. 342, 348, 268 Pac. 342, 345, as follows:

> "The case of Yuba Mfg. Co. v. Stone, 39 Cal. App 447, 179 P. 418, chiefly relied on by appellant, contains language that supports his contention. The case, however, is based upon decisions where fraud was not alleged. While recognizing the rule that a defrauded party cannot, by the 'simple device of a written instrument' be deprived of the right to prove fraud, it concludes with the statement that parol evidence cannot be permitted to nullify the further rule in relation to the effect of written instruments by the claim that the vendee was deceived by certain oral representations. Such, as we have pointed out, is not the law."

[*Argument on Specification of Error No. 2, supra.*]

The Court of Appeals was in error because the California rule (or exception to the parol evidence rule) expressly upholds the competency of parol evidence to prove that, by fraudulent representations of quality, character or capacity of the article, the deceiving seller has induced the believing buyer to sign the contract of purchase, and the right of the buyer to rely upon a fraudulent inducing warranty so made. (*Ferguson v. Koch,* 204 Cal. 342, 268 Pac. 342, 345; *American Soda Fountain Co. v. Martin,* 100 Cal. App. 43, 279 Pac. 680, 682, holding that "a writing may be impeached for fraud, and a parol warranty really made may then be relied upon rather than the written one thus shown to be fraudulently imperfect or defective." See also *Hodgkins v. Dunham,* 10 Cal. App. 690 (hearing denied by Supreme Court), 103 Pac. 351; *Jones v. Grieve,* 15 Cal. App. 561, 115 Pac. 333).

In *Ferguson v. Koch,* just referred to, after setting out *in extenso* the parol evidence rule against adding a warranty to a writing which contains no warranty at all, or extending or enlarging whatever warranty the writing may contain, the Supreme Court of California goes on to hold squarely that such is *not* the rule when a fraudulent oral warranty is relied upon, saying (204 Cal. 342, 268 Pac. 342, 345):

> *"It is equally well settled, however, that a writing may be impeached for fraud, and a parol warranty really made may then be relied upon rather than the written one thus shown to be fraudulently imperfect or defective.* Sec. 1257 [2 Mechem on Sales]; 9 Ency. of Ev., p. 492. Parol evidence is always admissible to

prove fraud, and it was never intended that the parol evidence rule should be used as a shield to prevent the proof of fraud. Hence, the fact that the sale of an automobile is evidenced by a written contract will not prevent the purchaser from proving by parol evidence that the sale was *induced by fraud.* And this is true even though the contract recites that all conditions and representations are embodied therein. Mooney v. Cyriacks, 185 Cal. 70, 195 P. 922; Hunt v. Field (Cal. Sup.) 262 P. 730; Whiting v. Squeglia, 70 Cal. App. 108, 232 P. 986. There is no such sanctity surrounding a writing that parties may not be permitted to go back of it and show that there was such fraud practiced in the procurement of the same as to vitiate the writing. The law never countenanced a rule which would deny to one the right to prove that fraud had been practiced upon him. . . .

"Appellant has cited us to certain earlier cases in our reports which he claims make a distinction between fraudulent representations going to induce the making of a contract and representations in the nature of warranties. There is no reason why any such distinctions should exist, and, in fact, none does exist. See Hayes v. Gammon, 168 Ark. 1116, 272 S. W. 644; Martin v. Shoub, 62 Ind. App. 586, 113 N. E. 384; 26 Cyc. p. 1145."

Moreover, inducing affirmations of quality made by the seller and relied upon by the buyer become express warranties in virtue of the statute, California Civil Code, Sec. 1732. [Footnote 7, p. 18.]

Whatever may have been the distinction, prior to the enactment of Sec. 1732, in 1931, between fraudulent affirmations (a) inducing a purchase but remaining outside

the contract, and (b) their effect as constituting a warranty (*Griswold v. Morrison* (1921), 53 Cal. App. 93, 200 Pac. 62), today such inducing affirmations, by force of the statute, become express warranties without the use of language so declaring or expressing such intent. (*Chamberlain Co. v. Allis-Chalmers Mfg. Co.* (1942), 51 Cal. App. 2d 520, 522, 125 P. 2d 113, 114, 115; *Stott v. Johnston* (1951), 36 Cal. 2d 864, 229 P. 2d 348.)

We respectfully submit that the warranty on which the trial court gave judgment in favor of the plaintiff against Dulien was fully proven, both under the rule of the California jurisprudence (*Ferguson v. Koch,* 204 Cal. 342, 348, 268 Pac. 342, 345; *American Soda Fountain Co. v. Martin,* 100 Cal. App. 43, 279 Pac. 680, 682) and the rule of the California statute (Civ. Code Sec. 1732), and the case in nowise turned on the parol evidence rule applied in *Germain Fruit Co. v. Armsby,* 153 Cal. 585, 96 Pac. 319, leaned upon by the Court of Appeals in reversing the judgment.

[*Argument on Specification of Errors Nos. 3, 4, supra.*]

Laying out of view the question of fraud, it was error for the Appellate Court to restrict the extrinsic evidence to the perfunctory and useless role of showing something which proved nothing. The thing being proven in the trial court was the clear meaning of the language in the sale order which, although with uncertainty, expressed character and quality: "Unused government surplus barbed wire, as purchased by seller from Interior Department." "Unused" is susceptible of several meanings, as: "brand new," "as good as new," "second-hand

but never utilized," "old, weather and worn out, but never utilized"—each connoting a different condition of quality. "As purchased by seller" is an obscure term creating wide room for doubt as to character; it leaves uncertain whether progression in time of purchase is meant, or whether source of purchase is referred to, or condition in which the goods were purchased at such time. The trial court was not able "to a certainty and with sureness, by a mere reading of the document" to determine the interpretation [R. 360, 361; 1975, 1976]. (*Bartel v. American Dental Supply Co.*, 114 A. C. A. 905, 251 P. 2d 16, 17; see also *McIntyre v. Angel*, 109 Cal. App. 2d 425 (hearing denied by Supreme Court, April 1952), 240 P. 2d 1047). "Once something has to be read into a contract to make it clear, it can hardly be said to be susceptible of only one interpretation." (*Union Oil Co. v. Union Sugar Co.*, 31 Cal. 2d 300, 188 P. 2d 470, 473).

The full meaning of the language having been thus properly "clarified" by parol evidence of conversations, including the *inducing affirmations* of the seller, showing the "quality of the wire agreed to be sold" (which the Court of Appeals held was admissible for that purpose), the writing then contained an *express warranty of quality* by force of California Civil Code Sec. 1732. [Footnote 7, p. 18.]

The parol evidence had a two-fold effect: It not only resolved the uncertain terms of quality in the writing to express what the parties meant, but it contained affirmations of the seller which brought the sale squarely within the jaws of said statute.

[*Argument on Specification of Errors Nos. 5, 6, supra.*]

The error was patent, since the complaint set forth the facts of the entire transaction and plaintiff alleged and proved and the trial court found all the elements of the fraud that induced the contract. The action *was* "predicated on fraud"; except for the seller's fraudulent affirmations of quality the buyer would not have signed the sale order, and having been damaged by the seller's *fraud* he had an action therefor.

It is immaterial, in this state of the record, whether or not the inducing fraudulent statements and samples submitted constituted a *warranty* that could be relied upon as such, the breach of which was compensable in damages (which we insist upon, but momentarily waive *arguendo*); warranty or no warranty, the fraud of the seller *induced the buyer to make the deal and sign the written sale order.* The purchase having thus been induced by fraud, not only was parol evidence admissible to show this *fraud,* "regardless of the wording of the instrument," but all damages arising to the buyer, out of the fraudulent sale foisted upon him, were recoverable in an action pleading and proving the facts of the transaction, irrespective of the title of the complaint or the language of the prayer.

(a) The following California authorities, extracted from a multitude of cases, establish the right to prove by parol the inducing fraud and the damages resulting therefrom. The parol evidence rule of exclusion which prohibits "varying or enlarging the terms of a written contract" does not apply to a contract induced by fraud, and fraud may always be shown by extrinsic evidence.

De Olazabal v. Mix, 24 Cal. App. 2d 258, 74 P. 2d 787; *Jarvis v. Singleton,* 129 Cal. App. 250 (hearing denied by Supreme Court), 18 P. 2d 382 (holding parol evidence admissible to show fraudulent representation that a right of way across property was not an easement, although deed expressly provided that land was subject to rights of way); *Rothestein v. Janss Investment Corp.,* 45 Cal. App. 2d 64, 113 P. 2d 465 (parol evidence of fraud admissible notwithstanding contract provided purchaser had inspected property, etc.); *Mooney v. Cyriacks,* 185 Cal. 70, 195 Pac. 922 (parol evidence admissible though writing purports to contain entire agreement of the parties); *Colt Co. v. Freitas,* 76 Cal. App. 278, 244 Pac. 916 (fraud, inducing buyer to enter into contract, provable although writing stipulates that it covers all agreements); *Long v. Los Altos Country Club,* 122 Cal. App. 116, 9 P. 2d 600, 602 (regardless of wording of the instrument, parol evidence admissible to show contract induced by fraud); *Hunt v. L. M. Field, Inc.,* 202 Cal. 701, 703, 262 Pac. 730, 731 (parol evidence proper "even where the written instrument purports to contain the entire agreement between the parties").

(b) Neither the caption of the complaint, in the instant case, nor the measure of damages prayed for, nor the style in which the complaint was cast, affected in the slightest plaintiff's right to damages. Rules 2, 8(a) and 54(c), F. R. C. P., 28 U. S. C., swept away and superseded the old forms, substituting a plain statement of the claim and authorizing appropriate relief on the case as made.

Pleadings, trial and judgment in all cases of a civil nature in the District Courts of the United States are governed by the Federal Rules of Civil Procedure and not by the rules of State practice *(Mutual Benefit etc. v. Thomas* (8th Cir.), 123 F. 2d 353; *Dallas Ry. & Terminal Co. v. Sullivan* (5th Cir.), 108 F. 2d 581; *Lachman v. Penn. Greyhound Lines* (4th Cir.), 160 F. 2d 496).

The decision of the Court of Appeals is in conflict with the Rules and with their interpretation by the Courts of Appeals for the Second, Third, Seventh and Tenth Circuits, and by the Supreme Court of the United States. A simple statement, in sequence, of the events which have transpired, coupled with a direct claim by way of demand for judgment of what the plaintiff hopes and expects to recover, is perferable to extensive pleading of seemingly precise legal theories, *(Gins v. Mauser Plumbing Supply Co., Inc.* (2nd. Cir. 1945), 148 F. 2d 974). Irrespective of whether the question was raised below, the appellate court is not justified in depriving plaintiff of its right because it mistook the nature of its remedy (construing Rule 2, on appeal from trial court's dismissal after judgment on pleadings). *(Union Mutual Life Ins. Co. v. Friedman* (2nd Cir. 1944), 139 F. 2d 542, 544). Without reference to its prayer plaintiff is entitled to the relief justified by the facts, even though its own theory may have been unsound. *(Truth Seeker Co. v. Durning* (2nd Cir. 1945), 147 F. 2d 54, 56). Plaintiff is entitled to

state his claims in detail and rely upon the court to award him such judgment as the case deserves, and he will not be bound by his prayer; mere legal theories cannot defeat appropriate remedies granted by law. *(Ring v. Spina* (2nd Cir. 1945), 148 F. 2d 647, 653). Under the Federal Rules the function of the complaint is to give fair notice to the adversary of the nature and basis of the claim asserted and a general indication of the type of litigation involved. A short statement which fairly gives notice of the nature of the claim is a sufficient compliance with the rules. (*Continental Collieries, Inc. v. Shober* (3rd Cir., 1942), 130 F. 2d 631.) The question is not whether plaintiff has asked for the proper remedy, but whether under his pleadings he is entitled to any remedy; designation of cause of action and prayer are immaterial; court will grant him appropriate relief under the facts pleaded. *(Kansas City, etc. v. Alton Rr. Co.* (7th Cir. 1941), 124 F. 2d 780, 783). Even though the trial court relied upon a wrong ground, the judgment if correct must be affirmed on appeal. *(Reconstruction Finance Corp. v. Goldberg* (7th Cir., 1944), 143 F. 2d 752, 756, citing *Letulle v. Scofield,* 308 U. S. 415, 421, 60 S. Ct. 313, 84 L. Ed. 355, and *Helvering v. Gowran,* 302 U. S. 238, 245, 58 S. Ct. 154, 82 L. Ed. 224, the latter holding that if the decision below is correct it must be affirmed although the lower court relied upon or gave a wrong reason). Court may decree equity as well as award damages under the wide sweep of Rule 54(c); party is entitled to appropriate relief regardless of prayer. (*Garland v. Garland* (10th Cir., 1947), 165 F. 2d 131, 133).

[*Argument on Specification of Error No. 7* (1), (2), (3), (4), *supra.*]

The decision was error because: (1) $214,535.00 was paid to the Bank by Londono as consideration for the letter of credit and the Bank's assumption of its obligation thereunder. A letter of credit is a contract between the customer and the bank and the bank may safely honor drafts against the letter only by remaining within the powers conferred, and acts at its peril if it exceeds them. *(Laudisi v. American Exchange National Bank,* 146 N. E. 347, 239 N. Y. 234, 239). The terms of the letter constituted an agreement between the purchaser and the bank, and the bank should not have accepted a draft without the inspection certificate demanded by the letter. *(Anglo-South American Trust Co. v. Uhe* (N. Y. Ct. App.), 184 N. E. 741, 261 N. Y. 150).

(2) The money disbursed by the Bank, without exacting of the seller the specified shipping documents, had been paid to the Bank by Londono as the purchase price of the letter of credit, and to say that the money was the Bank's own money is to sacrifice realism to *punctilio,* or to confuse the Bank's technical title to general deposits with money paid by a customer to purchase a letter of credit. The academic question of momentary *title* to the money did not relieve the Bank of its obligation to fulfill with strictness the conditions contained in the letter, or repay the amount thereof to Londono (See *Central Trust Co. v. Hanover Trust Co.,* 136 N. E. 336, 242 Mass. 265).

Only by obedience to such obligation can the banking and mercantile communities be protected. *(Banco Nacional Ultramarino v. First National Bank of Boston,*

289 Fed. 169). The papers demanded as a condition of disbursement under the letter of credit must literally comply therewith. (*Camp v. Corn Exchange National Bank* (Penn.), 132 Atl. 189, 191.)

(In a proper legal sense, however, the money paid out by the Bank *was* the purchaser's money; even the term "money on deposit in bank" is universally synonymous with "deposit credit"—and in the present case a *credit* was established by Londono's purchase of the letter of credit for $214,535.00. *Boyle's Estate,* 2 Cal. App. 2d 234, 37 P. 2d 841, 842; *People v. McGraw Electric Company,* 375 Ill. 241, 30 N. E. 2d 903, 907; *Industrial Trust Co. v. Saunders,* 71 R. I. 94, 42 A. 2d 492, 495, are illustrations, among a long list of authorities, holding "money" to include *deposits* or *credits* in bank.")

(3) The non-existence of shipping documents covering title to merchandise, against receipt of which disbursement of the money was conditioned, could not exempt the bank from liability for turning over the money without obtaining the documents; on the contrary, impossibility of obtaining the documents made imperative the Bank's refusal to disburse the money to the seller; it should have retained the money for Londono's account. It has been held that where a letter of credit in favor of a seller of sugar, to be shipped from Argentina, required that drafts be accompanied by bills of lading showing an Argentine government export license, compliance therewith was not excused by the fact that the sugar could be exported without such license (*Moss v. Old Colony Trust Co.* (Mass.), 140 N. E. 803). Only if the documents required satisfy the call of the letter can a bank accept and pay the draft; if they do not satisfy it, the bank must refuse acceptance

or payment. (*Crocker First National Bank v. De Sousa* (9th Cir., 1928), 27 F. 2d 462, quoting from decisions of the United States Supreme Court.)

(4) When a bank disburses a customer's money, in violation of its undertaking in a letter of credit, the bank becomes liable at once to the customer for the whole amount disbursed. A trust company receiving a draft for collection, accompanied by a bill of lading, made itself responsible to the drawer for the amount of the draft by delivering the bill of lading without payment of the draft (*Central Trust Co. of Illinois v. Hanover Trust Co.,* 136 N. E. 336, 242 Mass. 265, 267).

Furthermore, as to acts of the Bank causing damage to the plaintiff: Had Londono received the prescribed bill of lading, and found himself in the position (as he did) of being obliged, unwillingly, to keep the wire and sell it at salvage prices to mitigate the damage, he would have had an indefeasible right against Matson Navigation Company, for delivery of misdescribed merchandise, to recover the full difference between the amount of the net proceeds from such salvage sales and the $214,000.00 paid by the Bank, against his account, for the wire. This right could only accrue to Londono when he held a "clean, order" bill of lading transferred to him. (*The Carso* (D. C. N. Y., 1930), 43 F. 2d 736; *Baltic Cotton Co. v. U. S.* (5th Cir., 1932), 55 F. 2d 568, citing authorities including the United States Supreme Court. Federal Bills of Lading Act, 49 U. S. C. A., Sec. 102, p. 409; Carriage of Goods by Sea Act, 46 U. S. C. A., Sec. 1303(3) (c), p. 850.)

In the case at bar, the Bank became liable to the customer (Londono) for the whole amount of the

$214,000.00 disbursed, which amount was reduced and satisfied to the extent of the value of the wire (rusty and rotten wire; *"clean" wire only* could have lawfully been shipped on the bill of lading demanded by the letter of credit), which inferior wire the customer, ignorant of the Bank's violation, found thrust upon him and was obliged to sell for what he could get on the market, to mitigate the damage from the breach of their respective contracts by Dulien and the Bank, and diminishing *pro tanto* said defendants' ultimate indebtedness to Londono.

The opinion injects another false quantity into its reasons for the reversal when it says:

> "Mr. Londono's basic contention below and in his same brief here at page 46 is that the court properly found [Tr. 152] 'that "at no time was there an acceptance of the wire" by Mr. Londono and "that he rejected all of it."' "

Had the evidence and the finding been that Londono *rejected* the wire in the sense of *refusing to receive it and rescinding the contract,* this would not have exculpated the Bank, and Londono could have sued and recovered from it, nonetheless, the full mount of $214,535.00 for failure to obtain the specified documents; and he would have had, at the same time, an action against Dulien, in the nature of rescission, for the same amount. The circumstance that two judgments were possible in such a case is immaterial, so long as the injured plaintiff did not collect twice.

However, the fact is that the *rejection* by Londono of the wire was in the sense that he *refused to accept it as the wire he had contracted to buy;* as the trial court's findings show, he never "willingly accepted the wire" [R.

152]; but no alternative was left him, upon the seller's refusal to accede to such "rejection," except to keep the defective merchandise and sell it in mitigation,[12] and the trial court so found [R. 152]. In this posture, Londono, without a bill of lading, had no right of action against Matson Navigation Company, but he had a right of action against Dulien for his damages arising out of the fraud, and a right of action against the Bank for the money it unlawfully paid out, diminished in each case by the proceeds of the sales in mitigation. The circumstance that two separate judgments were possible in such a case is immaterial, so long as the injured plaintiff did not collect twice, and the court moulded its judgment herein to protect the defendants in that regard. [R. 200, 201, Judgment IX; R. 227, 228, Judgment X.]

Any benefit to Londono, whether consequent or adventitious, arising out of the transaction, after the Bank's liability became fixed by its act—anything that had the effect of dismissing his injury—would inure to the benefit of the Bank in reduction of its liability. But the *liability* would remain unaffected. Provided only, of course, that Londono, with full knowledge of the Bank's violation, did not himself so act as to waive his right against the Bank. Here, as was found, he did not know of or suspect the Bank's violation for several weeks [R. 151, Fdg., XXII]

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[12]*Dutra v. Cabral,* 80 Cal. App. 2d 114, 122, 181 P. 2d 26, 31; *City of Oakland v. Pac. Gas & Elec. Co.,* 47 Cal. App. 2d 444, 450, 118 P. 2d 328, 331; 15 Am. Jur., Damages, Sec. 30, p. 426; Sec. 29, p. 425.

and meantime was attempting to mitigate the loss [R. 152, Fdg. XXIII].

His "rejection" or *unwilling retention* of the wire, and his mitigation resales of wire, in this situation, contained no elements of waiver or estoppel. No *detriment,* but a *benefit,* accrued to the defendants by his acts. (*Astrich v. German American Ins. Co. of N. Y.* (3rd Cir.), 131 Fed. 13; Williston on Contracts, "Waiver," Rev. Ed., Vol. 3, p. 693; *Duval v. Metropolitan Life Ins. Co.,* 82 N. H. 543, 136 Atl. 400, 50 A. L. R. 1276.)

[*Argument on Specification of Error No. 8, supra.*]

It was not necessary, under Federal Rules of Civil Procedure 2, 8(a) and 54(c) (heretofore argued at pp. 29-31 hereof, with citations of authority, none of which will be repeated), for Londono to frame his complaint against the Bank in any particular form. Indeed, his action was in essence one for money had and received on *failure of consideration* [Comp't., R. 16, 24; Fdg. XXIX; R. 16, 24, XXXII, R. 167]—to recover the sums he paid for the letter of credit and the service charge, lessened by the receipts in mitigation. Having pleaded the facts of the transaction, he was entitled to appropriate relief on the case as made, and the recovery would have been the same no matter how he alleged the facts or worded the prayer.

Conclusion.

It is respectfully urged that, for the reasons above given, the Court of Appeals has so misconstrued and misapplied the local law [of California] and the Federal statutes and Rules of Civil Procedure, and has so far departed from the accepted and usual course of judicial proceedings, and required such a departure by the District Court, as to call for an exercise of the powers of supervision of this Court. Wherefore petitioner respectfully prays that this petition for a writ of certiorari be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1953
No. 282.

J. B. LONDONO,

Petitioner,

vs.

CITIZENS NATIONAL TRUST & SAVINGS BANK OF LOS ANGELES, DULIEN STEEL PRODUCTS, INC., OF CALIFORNIA and DULIEN STEEL PRODUCTS, INC.,

Respondents.

Brief of Respondent Citizens National Trust & Savings Bank of Los Angeles in Opposition to Petition for Writ of Certiorari.

(Italics are ours unless otherwise noted.)

Opinions Below.

The opinion of the United States Court of Appeals for the Ninth Circuit is printed in the record [R. 3487-96] and is reported, 204 F. 2d 377.

At the close of the trial in the District Court, the trial judge gave an oral opinion from the bench, which was transcribed and is contained in the record [R. 3029]. This opinion has not been reported in Federal Supplement.

Jurisdictional Statement.

The ground of jurisdiction of the District Court was diversity of citizenship (action between citizens of a state and a subject of a foreign country) (former Tit. 28 U. S. C., sec. 41, subpar. (1), clause (c), now Tit. 28 U. S. C., sec. 1332, subpar. (a), clause 2). The complaint alleged [R. 4] and the court found [R. 122] the required diversity.

The trial court entered final judgment against respondents on November 17, 1950 [R. 202]. Respondent Citizens National Trust & Savings Bank of Los Angeles (hereinafter referred to as the "Bank") filed its notice of appeal to the United States Court of Appeals for the Ninth Circuit on December 12, 1950 [R. 207-9]. Respondent Dulien Steel Products, Inc., of California and Dulien Steel Products, Inc. (in the record referred to in the aggregate as "Dulien" but by the Court of Appeals, and hereinafter, usually called Steel Company) filed their notice of appeal on the same day [R. 209-10]. The jurisdiction of the Court of Appeals was invoked under Title 28 U. S. C., section 1291.

The Court of Appeals entered its judgment of reversal March 30, 1953. Petition for rehearing was timely filed by the appellee, petitioner herein, and was denied on June 24, 1953 [R. 3498].

Petitioner invokes jurisdiction of the court to review the case on writ of certiorari under Title 28 U. S. C., section 1254, subparagraph (1).

Statutes Involved.

The case does not involve the constitutionality of any statute, state or federal, but does involve the proper construction to be given certain California statutes and incidentally certain Federal Rules of Civil Procedure. These will be noticed in the argument.

Statement of the Case.

Petitioner's Summary Statement of the matters involved is inaccurate and incomplete and as a result does not give a fair and complete Summary Statement of the case. Petitioner has so over-stated his case that he gives a false impression of the nature of the case and the issues involved. In the Court of Appeals the Bank, as appellant, attacked numerous findings of fact on the ground they were not supported by substantial evidence. The Court of Appeals did not expressly pass on such contentions but based its decision on questions of law. Without pointing out in detail the inaccuracies in petitioner's Summary Statement, we desire to make our own statement.

One July 12, 1946 petitioner, an experienced importer from Colombia, by written contract, purchased from the Steel Company, f. o. b. steamer at Los Angeles, 2,700 tons of barbed wire for reshipment to South America for resale [R. 31, 350, 655, 656, 707]. The contract did not contain a warranty as to quality, but it did contain a provision that petitioner could reject 300 tons for "ex-

cessive weathering."[1] The contract was prepared by the Steel Company and was executed voluntarily by petitioner [R. 647-48, 2004]. The Steel Company, a week or so later, learned its shipment of barbed wire was only 2,300 tons and it was orally, mutually agreed that petitioner would purchase 2,000 of the 2,300-ton shipment under the terms of the written contract except for quantity of wire purchased [R. 367, 655, 656].

Prior to the execution of the contract, the Steel Company had represented to petitioner that the barbed wire purchased was unused government surplus barbed wire purchased by it from the Department of Interior in Honolulu and that the wire was coming from Honolulu and that it was "good" [R. 355, 638, 1990, 2002]. Certain rolls of wire in the Steel Company's warehouse and certain cuttings of barbed wire were given petitioner by the Steel Company [R. 345-50]. They were not part of the 2,300-ton shipment, as no portion of the wire purchased by the Steel Company from the government had yet arrived in the United States [R. 2265, 3336, 3383, 3399]. When the case was argued before the Court of Appeals, petitioner admitted that the wire he received was the wire described in the contract.

At the time the contract was orally amended as to quantity of wire purchased but prior to the arrival of the steamer bringing the 2,300-ton shipment to the United States, the Steel Company authorized petitioner to select

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[1]The statement in the contract that the wire purchased was "unused government surplus barbed wire as purchased from Interior Department" and that 1,350 tons would be black and that 1,350 tons would be galvanized may be an affirmation of fact and, therefore, an express warranty within the meaning of Section 1732 of the California Civil Code (quoted in part in Pet. p. 18, footnote 7).

the best 2,000 tons of barbed wire out of the 2,300-ton shipment [R. 656]. The Steel Company at no time represented to petitioner the character of the bill of lading by which the 2,300 tons of barbed wire were being shipped to the United States, and petitioner made no inquiry of the Steel Company or anyone else concerning that subject [R. 634, 654-55].

The 2,300 tons of barbed wire was shipped by the Steel Company from Honolulu on July 19, 1946, by steamer of the War Shipping Administration operated by Matson Navigation Co., hereinafter referred to as "carrier," and arrived in Los Angeles in the afternoon of July 26, 1946 [R. 1250, 1252]. Fifteen hundred tons of the barbed wire the Steel Company purchased from the government in Honolulu was aboard the same steamer consigned to another party [R. 2530]. The 2,300-ton shipment in question and the 1,500-ton shipment were commingled by the carrier in the hold of the steamer [R. 1428]. Over the protest of the Steel Company and petitioner, the carrier permitted the consignee of the 1,500-ton shipment to select only wire free from rust as it was unloaded [R. 1489-1507].

On July 27, 1946, petitioner purchased from the Bank a letter of credit in favor of the Steel Company for $214,000.00 to pay the purchase price of the wire upon delivery to the Bank by the Steel Company of a full set of clean on board ocean bills of lading, made out to order, marked freight prepaid, and commercial invoices evidencing shipment of 2,000 tons of "barbed wire" [Ex. 5; R. 660-61, 670, 679, 2362]. At the time the letter of credit was purchased, the steamer carrying the 2,300-ton shipment from Honolulu had landed in Los Angeles [R. 1252].

On July 29, 1946, the Bank paid the letter of credit upon receipt of a paid freight bill for 2,300 tons of wire on the back of which petitioner, personally, on July 31, 1946, secured the Steel Company's endorsement of the bill of lading of the 2,300-ton shipment to the extent of 2,000 tons to petitioner [R. 36, 982-89]. Thereafter, petitioner retained the paid freight bill with the endorsement on the back of it in his possession for some three weeks without complaint to the Bank [R. 413, 723]. Petitioner, or his assignee, obtained the wire from the carrier by virtue of the paid freight bill [R. 925, 1048].

Petitioner inspected the wire as it was unloaded from the steamer on numerous occasions and observed its condition [R. 497, 500, 522, 594, 687, 702, 730, 741]. On August 1, 1946, he requested the Steel Company, in writing, to renegotiate the price because of the rusty condition of the wire [Ex. 23; R. 416, 737]. Thereafter, petitioner and a representative of the Steel Company inspected the wire together, and on or about August 5, 1946, petitioner agreed to take his wire and set aside that which was rusty, and the Steel Company agreed to renegotiate the price of the rusty wire [Ex. 25; R. 418, 420-27, 741].

Beginning on August 7, 1946, and for the balance of that month, petitioner took a large quantity of the 2,000 tons he had purchased from the Steel Company and reshipped approximately 1,026 tons to South America to fill an order he had for 1,000 tons of wire [Ex. C-Z-1; R. 1630-31]. The wire taken by petitioner from the carrier was hand picked from the 2,300-ton shipment [R. 1007]. No wire taken by petitioner from the carrier was rejected for excessive weathering, nor was any of

the rusty wire set aside or apart or weighed or inventoried [R. 765-67, 1007-8].

After petitioner had taken in excess of 1,080 tons from the carrier, he orally informed the Steel Company he rejected the wire [R. 455], but at no time offered to return the wire previously taken from the carrier, nor did he demand a return of the purchase price, nor any portion thereof, nor did he ask the Steel Company to take back the wire he had already taken from the carrier. He at no time rescinded the contract nor claimed it was invalid for any reason.

The wire received by petitioner from the carrier was of mixed quality varying from good to heavily rusted [R. 1215-19]. Petitioner admitted that even though barbed wire is rusty it is still "good" [R. 499, 2924, 2928].

In July of 1947, petitioner filed his complaint in three causes of action [R. 3-36]. The first cause of action [R. 3-16] was against the Steel Company alone for damages for breach of warranty. The second cause of action [R. 16-24] was against the Bank alone for damages for breach of contract in honoring the letter of credit without obtaining the required bill of lading. The third cause of action [R. 24-29] was against the Matson Navigation Company for damages for issuing a false bill of lading for the barbed wire.

The first cause of action (against the Steel Company) proceeded upon the theory that the day before the execution of the written agreement of sale and purchase of the barbed wire, the Steel Company exhibited to petitioner a number of sample coils of barbed wire, free of rust, and covered with a rust-preventing grease, and, as an induce-

ment to petitioner to make such purchase, orally agreed and

> "expressly warranted that the wire to be sold to plaintiff had been, was, and would be covered with a coat of protective, rust-preventing grease, and was and would be in all respects equal in quality to said exhibited coils and sample cuttings." [Compl. par. IV; R. 6.]

There were allegations of fraudulent misrepresentations by the Steel Company, but the gravamen of the first cause of action was for breach of warranty.

Allegations showing that petitioner's theory was a recovery on the parol warranty appear frequently throughout the first cause of action, for example: "express warranty" [Par. V, R. 7]; "warranted by defendant Dulien" and "warranty to plaintiff" [Par. X, R. 10]; "breach of warranty" [Par. XI, R. 12]; "warranted by Dulien to plaintiff" [Par. XII, R. 12]; "breach of warranty" [Par. XV, R. 13]. In Paragraph XVI, which itemizes the damages against Steel Company, petitioner alleges that he was damaged

> "as the direct and proximate result of Dulien's failure to deliver the quantity of said wire purchased by plaintiff and *its breach of warranty* as to the wire actually delivered to or made available to plaintiff * * *" [R. 13].

In itemizing the damages petitioner claimed (a) damages for 81 tons purportedly not delivered at the purchase price of $107.00 per ton; (b), (c) and (d) the difference between the purchase price and the sale price of several lots sold by petitioner; (e) and (f) the amount of special expenses and personal expenses already alleged,

with interest on all of these items; and (g) petitioner's loss of profits of $66,000.00, being $33.00 per ton, the difference between the purchase price of $107.00 per ton and the reasonable market value at Los Angeles, California, of $140.00 per ton, making a grand total of $197,-552.66 [R. 14, 15], and he prayed for damages in that amount [R. 29].

In the second cause of action (against the Bank), petitioner set out the alleged breach of contract on the part of the Bank in paying the Steel Company $214,000.00 without obtaining the required bill of lading, and then computed damages in exactly the same manner and amount as against the Steel Company [R. 21-23], and prayed for damages in that amount [R. 29-30].

The third cause of action (against Matson Navigation Company) was for damages in issuing a false bill of lading. This amount of damages was computed in the same manner as the damages against the Steel Company and the Bank except that the loss of profits in the amount of $66,000.00 was omitted [R. 27-29].

Some months thereafter petitioner brought a libel *in personam* against the United States of America, the U. S. Maritime Commission, the War Shipping Administration, and the owners of the vessel on which the wire was shipped [R. 230-46]. The libel was for damages for issuance of a false bill of lading and was based on the same theory as the third cause of action in the principal case and for the same amount.

Defendants answered. The present action and the action in admiralty were tried together. Petitioner, a witness in his own behalf, volunteered testimony concerning the parol warranty alleged to have been made by the

Steel Company's representative to petitioner the day before they had entered into the written agreement or sale order [R. 346]. Motions to strike by the respective attorneys for the respondents, on the ground that the evidence was in violation of the parol evidence rule [R. 347-48] were denied, and the petitioner was given complete freedom in any future testimony on this subject, subject to the same objections, the trial court stating that the ruling would be the same [R. 348-49]. When further testimony was given [R. 349-54] and an objection was made by counsel for the respondents on the ground that testimony referred to a sale by sample, as to which a written agreement was silent, the court overruled the objections and later denied the motions to strike stating the additional ground that the document was not plain as to its terms [R. 359-61].

At the close of the trial the court delivered an oral opinion [R. 3029 *et seq.*] in which it stated that if the written agreement between the petitioner and the Steel Company

> "were clear, I would not have permitted the oral testimony which I did in connection with the circumstances surrounding it as to what was meant. To me there is some ambiguity—'surplus barbed wire as purchased by seller from Interior Department,' 'steamer due to arrive in Los Angeles,' 'excessive weathering,' the 'on-board' bills of lading and the like" [R. 3030].

The trial court ordered judgment for petitioner against Steel Company [R. 3036] and against the Bank [R. 3047] but in favor of defendant Matson Navigation Company [R. 3051]. It also ordered judgment in favor of the libelees in the admiralty action [R. 3051-52]. The

amount of the damages against the Steel Company and the Bank were determined at a later session of the court, the evening of the same day [R. 3054 *et seq.*].

In discussing petitioner's proposed findings, the trial court said that

> "the case was not tried as a fraud case; it was tried as a breach of warranty case" [R. 3281].

The trial court made findings in favor of petitioner. It found that the "said sale order did not constitute the entire contract between plaintiff and Dulien [the Steel Company]" [R. 126]; that the language of the sale order "was ambiguous on its face"; and that the contract between petitioner and the Steel Company

> "consisted not only of said sale order dated July 12, 1946, but of the previous oral conversations between plaintiff and Dulien, the showing of the sample rolls and the giving of the sample cuttings of wire to plaintiff and the oral representations by Dulien in regard thereto * * *" [R. 127];

that said contract in substance was that the Steel Company would sell and deliver to petitioner, and petitioner would buy and receive from the Steel Company

> "2,000 tons of good, non-rusty, merchantable barbed wire * * * equal in quality and condition to the sample rolls shown and the sample cuttings given to plaintiff as herein stated, for export to and sale in South America by plaintiff * * *" [R. 127-28].

The trial court found that the reasonable market value in Los Angeles County, California, on July 29, 1946, for export of black barbed wire of the type and quality which Steel Company agreed "to sell and warranted to plaintiff" [R. 159] was $130.00 per ton, or $130,000.00

for 1,000 tons, and of galvanized barbed wire was $160.00 per ton or $160,000.00 per 1,000 tons—or a total of $290,000.00 [R. 159]. The court further found that "there was a breach of warranty" by the Steel Company that plaintiff suffered loss which "directly and naturally resulted from said breach of warranty" and that "by reason of said breach of warranty" [R. 172] plaintiff was damaged in the total sum of $290,000.00 as of July 29, 1946, "said sum being the value which said wire would have had to plaintiff if it had answered to the warranty made to plaintiff by said defendants Dulien" [R. 172] and in the additional sum of $9,540.66 special damages or a total of $299,540.66, less sums received in mitigation of damages for the sale of the wire, to wit: $117,841.29, which sum the court found to be the value of the wire delivered to petitioner [R. 172]. The difference between these two amounts, $181,699.37, plus interest, was a total sum of $236,355.51 [R. 173].

After making these findings, the trial court further found that the representations as to the condition and quality of the wire were false, and that the Steel Company knew them to be false and knew petitioner was relying on them. The court further found that the petitioner had a right to rely and did rely on these representations to his damage [Finding XLV, R. 177-78].

Against the Bank the court computed the damages as follows: $214,000.00, the amount of the letter of credit, plus special damages $9,540.66, or a total of $223,540.66,

less recoveries in the amount of $117,841.29 before credit on the balance of the unpaid note of petitioner, or the sum of $105,699.37 which, with interest, amounted to $137,494.23. Deducting the amount of the Bank's counter claim and interest, the net balance of $120,312.88 was found [R. 173-74].

Judgment in favor of petitioner was entered against Steel Company in the sum of $236,355.51 [R. 200] and against the Bank in the sum of $120,312.88 [R. 200].

The trial court in effect subrogated the Bank to petitioner's claim against the Steel Company [R. 201-202, 227-28].

On appeal by the Steel Company and the Bank the Court of Appeals, on an opinion by District Judge Harrison [R. 3487-92; 204 F. 2d 377-379], held that the trial court

> "used parol evidence to rewrite the contract of sale for the parties. This is violative of the settled law of California." [R. 3490; 204 F. 2d 379.]

It reversed the judgments and remanded the causes [R. 3491; 204 F. 2d 379].

Chief Judge Denman wrote an opinion (Circuit Judge Healy concurring) relating to the Bank's appeal [R. 3492-96; 204 F. 2d 379-381]. In this opinion the Court of Appeals said:

> "Not only does Mr. Londono's complaint fail to allege any act of the Bank which proximately caused any damage to Mr. Londono, but the case was tried and decided below on grounds which make irrelevant any question concerning the bill of lading or any act of the Bank." [R. 3495; 204 F. 2d 381.]

The Court of Appeals reversed the judgment against the Bank with directions to the District Court to take further proceedings on its present record in accord with the views on that judgment there expressed [R. 3496; 204 F. 2d 381].

Further discussion of the opinion more properly belongs in the argument about to follow.

Questions Presented.

The jurisdiction of the federal courts of the case at bar is based upon diversity of citizenship. The question here is not whether the federal courts are required to follow the local substantive law, for of course they are (Sec. 1652 of Title 28, U. S. C., cited, Pet. pp. 16 and 17). The real question is what is the substantive law of California applicable in both branches of the case at bar. Certain of the Federal Rules of Civil Procedure may incidently be involved.

We think that the Court of Appeals properly applied the California substantive law in both branches of the case and accordingly that it followed the mandate of Section 1652 of Title 28, U. S. C. We also believe that the opinion of the Court of Appeals did no violence to Rules 2, 8(a) and 54(c) of the Federal Rules of Civil Procedure so strenuously relied on by the petitioner (Pet. pp. 4, 13, 19, 29 and 37).

Specifically, we shall urge the points as next hereinafter set up under the heading "Summary of Argument."

Summary of Argument.

1. The substantive law of California does not permit a parol warranty to be added to a written agreement complete in itself and recovery to be had for such breach of warranty, either because of fraudulent representations or because of ambiguity in the written agreement. Since the case below was pleaded, tried, decided and judgment awarded on the theory that petitioner was entitled to damages for breach of a parol warranty, the Court of Appeals properly reversed the judgment against the Steel Company.

2. Rules 2, 8(a) and 54(c) do not import any new rules into civil actions at law in the federal courts in California. These rules have been the law of California since 1851 and have therefore governed federal district courts in California in actions at law since 1872 when Congress adopted the Conformity Act. The rules do not prevent a reversal of a judgment awarded on a wrong theory and a wrong measure of damages.

3. Petitioner failed to allege in his complaint, much less prove at the trial, any act of the Bank which proximately caused any damage to him. The case was tried and decided below on grounds which made irrelevant any question concerning any act of the Bank.

ARGUMENT.

I.

The Substantive Law of California Does Not Permit a Parol Warranty to Be Added to a Written Agreement Complete in Itself and Recovery to Be Had for Such Breach of Warranty, Either Because of Fraudulent Representations or Because of Ambiguity in the Written Agreement. Since the Case Below Was Pleaded, Tried, Decided and Judgment Awarded on the Theory That Petitioner Was Entitled to Damages for Breach of a Parol Warranty, the Court of Appeals Properly Reversed the Judgment Against the Steel Company.

The record clearly discloses that the action below so far as it involved the Steel Company, was pleaded on the theory that the petitioner was entitled to damages for breach of a parol warranty. It was tried and decided on that theory. The trial court awarded judgment and computed the damages on that theory. Petitioner contends here, as he did before the Court of Appeals, that he is entitled to damages for breach of warranty under Section 1789, subdivision 7 of the California Civil Code (see Pet. pp. 6 and 22). Subdivisions 6 and 7 of said Code section provide as follows:

> "(6) The measure of damages for breach of warranty is the *loss directly and naturally resulting in the ordinary course of events from the breach of warranty.*
>
> "(7) In the case of breach of warranty of quality, such loss, in the absence of special circumstances showing proximate damage of a greater amount, is the difference between the value of the goods at the time of delivery to the buyer and the value they would have *had if they had answered to the warranty.*"

The trial court found in Finding XXXVII:

> "That there was a breach of warranty by Dulien * * * as to the quality of the wire sold and delivered to plaintiff; that plaintiff suffered loss which *in the ordinary course of events directly and naturally resulted from said breach of warranty,* and plaintiff was damaged * * * by reason of said breach of warranty in the total sum of $290,000.00 as of July 29, 1946, said sum being the value which said wire would have had to plaintiff if *it had answered to the warranty* * * *." [R. 172.]

This was not a case of mere mislabeling of the complaint, but rather the gravamen of the entire complaint was in contract for breach of warranty and amounted to an election of that remedy—a matter which will later be discussed. There are, of course, scattered allegations of misrepresentation of the wire purchased, but as the Court of Appeals pointed out,

> "If Londono had been defrauded his action would have been predicated on fraud, a tort, not upon a breach of warranty, an action on a contract." [R. 3490; 204 F. 2d 379.]

It appears from the opinion of the trial court that if the written agreement were clear, it would not have permitted the oral testimony which was had in connection with the surrounding circumstances [R. 3030]. Petitioner refuses to be limited to this ground. He strenuously argues here (Pet. pp. 6 and 22) as he did below, that since the parol warranty was fraudulently made by the Steel Company, the substantive law of California permitted the introduction of parol evidence and that he may recover damages for breach of the parol warranty thus proven (Pet. pp. 23-26). Adopting the reasoning

of the trial court he further argues that the parol warranty could be proven, and recovery had for breach thereof because it properly "clarified" the written agreement (Pet. pp. 26-27).

Neither of plaintiff's contentions is well taken.

A. The Substantive Law of California Does Not Permit a Parol Warranty to Be Added to a Written Agreement and Recovery to Be Had for Such Breach Because of Fraudulent Representations.

In support of his contention that since the parol warranty was made fraudulently, he is entitled to recover damages for its breach, petitioner urges that there are two separate and distinct rules to be respectively applied in proving warranties in the sale of goods: one, excluding parol evidence where fraud is not involved, and the other permitting parol evidence of a fraudulent warranty which induced the buyer to make the contract (Pet. p. 16).

In none of the California cases cited by petitioner involving fraud where there was a written bilateral agreement was any recovery permitted in contract for damages for breach of a parol warranty. The mere fact that the fraud took the form of a warranty did not, of course, prevent the buyer from relying upon it to recover *in tort* for damages for fraud, or to rescind or as a defense against recovery by the seller of the purchase price.

In *Ferguson v. Koch,* 204 Cal. 342, 268 Pac. 342 (cited, Pet. pp. 16, 23, 24 and 26) and in *American Soda Fountain Co. v. Martin,* 100 Cal. App. 43, 279 Pac. 680

(cited Pet. pp. 17, 24 and 26), the buyer in each case was permitted to show the parol warranty as a *defense against recovery by the seller of the purchase price.* In *Jones v. Grieve,* 15 Cal. App. 561, 115 Pac. 333 (cited, Pet. p. 24), the buyer was allowed to *rescind* upon a showing of fraudulent representations. In *Morris v. Harbor Boat Bldg. Co.,* 112 Cal. App. 2d 882, 247 P. 2d 589 (cited Pet. p. 17), the buyer brought an action against the sellers to recover damages for fraud. Judgment on the pleadings in favor of the defendants was rendered by the trial court. The District Court of Appeals reversed, pointing out that:

> "An examination of the pleadings herein discloses that plaintiff is claiming no additional warranty and is not attempting to vary the terms of a written instrument. The claim is simply that by reason of certain fraudulent representations the purchaser of a boat was induced to execute a contract which otherwise would not have been entered into." (112 Cal. App. 2d 887, 247 P. 2d 592.)[2]

Section 1625 of the California Civil Code (quoted in full, Pet. p. 2), is to be found under Title II, "Manner of *Creating* Contracts," Part 2 "Contracts," Division 3rd "Obligations." Section 1856 of the California Code of Civil Procedure (quoted in full, Pet. p. 3) permits parol evidence of fraud for the purpose

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[2]In the case at bar petitioner claimed an additional warranty and was attempting to vary the terms of a written instrument. He was not willing to limit his claim to damages for fraudulent representations, in which case they would be governed by the federal or "out-of-pocket" loss rule. (*Bagdasarian v. Gragnon,* 31 Cal. 2d 744, 760-761, 192 P. 2d 935, 944-945.)

of establishing fraud, but not as evidence of the terms of the agreement. Parol evidence to add a warranty to the terms of a contract complete in itself, is forbidden.

> *Germain v. Armsby,* 153 Cal. 585, 96 Pac. 319 (relied upon by the Court of Appeals);
>
> *United Iron Works v. Outer Harbor etc. Company,* 168 Cal. 81, 84-85, 141 Pac. 917, 920.

While neither of these cases involved fraud except in the sense that a parol warranty relied on by the buyer to his damage may be and usually is, fraudulent, they represent the substantive law of California and, as such, were properly followed by the Court of Appeals.

The case of *Hodgkins v. Dunham,* 10 Cal. App. 690, 103 Pac. 351 (cited Pet. pp. 18-24), was an action by the buyer to recover the purchase price agreed to be paid for a certain stallion and also damages for alleged fraudulent representations. The trial court allowed recovery of the purchase price and also damages for breach of the parol warranty. In this case there was no written contract but merely a bill of sale signed by the seller and receipted for and accepted by the buyer. This case and others were distinguished on this very ground by the District Court of Appeal in *Lamb v. Otto,* 51 Cal. App. 433, 197 Pac. 147, where the court said:

> "All of those cases involved unilateral contracts such as a deed, a bill of sale, a guaranty, an order for merchandise, etc., or contracts resting on parol." (51 Cal. App. 435, 197 Pac. 148.)

The other cases cited by petitioner in support of his specifications of error numbers 1 and 2, deal with his argument on Section 1732 of the California Civil Code which we will now briefly consider.

Petitioner relies on Section 1732 of the California Civil Code (Pet. pp. 18, 25, 26 and 27, quoted in part, Pet. p. 18, footnote 7). Before enactment of this section, representations were not necessarily a warranty (*Griswold v. Morrison* (1921), 53 Cal. App. 93, 200 Pac. 62—cited Pet. p. 26). Since the enactment of section 1732 in 1931, an affirmation of fact may be a warranty. If contained in a written agreement it may be given effect as such (*Chamberlain Company v. Allis-Chalmers Mfg. Co.,* 51 Cal. App. 2d 520, 125 P. 2d 113—cited Pet. p. 26), or if contained in an agreement not in writing it may be enforced (*Stott v. Johnston,* 36 Cal. 2d 864, 229 P. 2d 348—cited Pet. p. 26). This section, however, merely determines whether language becomes a warranty or remains simply a representation. The section has nothing to do with the question whether a parol warranty can be enforced as a warranty when the contract was written and did not contain the warranty.

Section 1732 of the California Civil Code is section 12 of the Uniform Sales Act. The Uniform Sales Act became effective in the year 1909 in the State of Ohio and section 12 thereof was enacted as section 8392 of the General Code. This section became involved in *Hamilton Iron & Steel Company v. Groveland Mining Co.,* (C. C. A. 6th Cir.—1916), 233 Fed. 388. There District Judge Sanford (later Mr. Justice Sanford of this court), speaking of the parol evidence rule said:

> "And this rule as to the merger of prior representations in a subsequent complete contract is applicable, as we have heretofore held in *Marmet Coal Co. v. People's Coal Co.* (6th Cir.), 226 Fed. 646, 650, 141 C. C. A. 402, to any prior representation relied on as an affirmation of fact constituting an express warranty under the Ohio Uniform Sales

> Act; such prior representation not being available as a warranty under that act when merged in the subsequent written contract purporting to contain the entire agreement of the parties." (233 Fed. 392.)

Section 12 of the Uniform Sales Act became effective in Massachusetts in 1909 as Section 12 of Chapter 106 of the General Laws. In *Glackin v. Bennett,* 226 Mass. 316, 115 N. E. 490, the Supreme Judicial Court of Massachusetts said:

> "An express warranty, which is an affirmation of fact inducing the sale (Sales Act. St. 1908, c. 237, Sec. 12), cannot be added to the written agreement, under the rule permitting an agreement by parol, which is collateral to the contract and on a distinct subject, to be proved." (226 Mass. 320-321, 115 N. E. 492.)

B. The Written Agreement of Purchase and Sales Between Petitioner and the Steel Company Was Not so Ambiguous as to Permit a Rewriting Thereof, so as to Make the Agreements a Contract of Sale by Sample.

Petitioner, relying on Section 1860 of the California Code of Civil Procedure (quoted in full, Pet. p. 6), argues that, laying out of view the question of fraud, the full meaning of the language of the written agreement was properly "clarified" by the trial judge by parol evidence of conversations, and that it was error for the Court of Appeals to hold that the evidence was inadmissible (Pet. pp. 26 and 27). As we have already noted, the trial court in its memorandum of opinion, admitted oral testimony "in connection with the circumstances surrounding" the written contract on the ground that the written contract was not clear [R. 3030].

Section 1647 of the California Civil Code provides that "A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates." In *United Iron Works v. Outer Harbor, etc. Co.,* 168 Cal. 81, 141 Pac. 917, appellant contended that under this section and 1860 of the Code of Civil Procedure, parol evidence of the surrounding circumstances was admissible to show that a warranty was given even if it were not expressly embodied in the written contract. The Supreme Court of California denied this contention, saying:

> "In this, however, appellant errs. 'These sections but enact the common-law rule. It is never within their contemplation that a contract reduced to writing and executed by the parties shall have anything added to it or taken away from it by such evidence of "surrounding circumsetances."' This rule of evidence is invoked and employed only in cases where upon the face of the contract itself there is doubt and the evidence is used to dispel that doubt, not by showing that the parties meant something other *than* what they said but by showing what they meant *by* what they said." (168 Cal. 84, 141 Pac. 920. Italics the court's.)

Petitioner claims that the language of the agreement "unused Government surplus barbed wire as purchased by seller from Interior Department" is uncertain as to character and quality of the wire. He argued that "unused" is susceptible of several meanings, and that the phrase "as purchased by seller" is an obscure term (Pet. pp. 26 and 27).

There was no question but that the barbed wire delivered by the seller, Steel Company, to petitioner was "unused Government surplus barbed wire, as purchased by

seller from Interior Department." The words "as purchased" connote substantially the same meaning as the words "as is." The latter words when used in a contract of sale have been held to forbid the implication of a warranty either expressed or implied and the exclusion of testimony offered to explain such words has been approved. (*Union Trust Co. v. Detroit River Transit Co.,* 162 Mich. 670, 675-676, 127 N. W. 780, 782; *Detroit Trust Co. v. Engel,* 192 Mich. 62, 64, 158 N. W. 123, 124; *Johnson v. Waisman Bros.,* 93 N. H. 133, 136, 36 A. 2d 634, 636; 46 Am. Jur. 501, par. 319.)

Petitioner has entirely ignored the provision in the written agreement between himself and Steel Company which reads:

> "Acceptance of material subject to rejection by buyer of not more than 300 net tons due to excessive weathering." [R. 31.]

This provision alone forbids the implication of a warranty of quality either expressed or implied.

Petitioner's contentions that a parol warranty can be added to the written contract on the ground that it was fraudulently made, or on the second ground that it serves to clarify the written agreement, are contrary to the substantive law of California. The Court of Appeals committed no error in following the California substantive law.

II.

Rules 2, 8(a) and 54(c) Do Not Import Any New Rules into Civil Actions at Law in the Federal Courts in California. These Rules Have Been the Law of California Since 1851 and Have Therefore Governed Federal District Courts in California in Actions at Law Since 1872 When Congress Adopted the Conformity Act. The Rules Do Not Prevent a Reversal of a Judgment Awarded on a Wrong Theory and a Wrong Measure of Damages.

In the exposition of his second reason why this court should grant certiorari, petitioner urges that the opinion of the Court of Appeals has the effect of nullifying in California, and perhaps the Ninth Circuit, Rules 2, 8(a) and 54(c) of the Federal Rules of Civil Procedure (Pet. p. 13). He says the action of the Court of Appeals not only results in a grave injustice in the case at bar, but is of general interest

> "because the opinion amounts to a judicial pronouncement initiating a return of the Federal Courts in California, indeed through the 9th Circuit, *to the old rules of practice and procedure in the State courts,* whereunder the allegations of the complaint must sound in tort or else in contract, and the plaintiff seek and be bound by the prayer for a specific remedy and measure of relief, at the peril of reversal on appeal." (Pet. p. 14. Italics petitioner's.)

Rules 2, 8(a) and 54(c) of the Federal Rules of Civil Procedure are respectively the collateral kin, if not

the direct descendants, of Sections 1, 39 and 147 of the Practice Act of California, adopted April 29, 1851 (Stats. 1851, pp. 51, 56 and 73). In 1872 these sections of the Practice Act were reenacted in substantially the same language in Sections 307, 426 and 580 of the Code of Civil Procedure respectively where they still remain.[3]

In 1872 Congress enacted the Conformity Act (17 Stats. at Large, p. 197), Section 5 of which made the practice, pleadings, and forms and modes of proceeding in other than equity and admiralty causes in the federal courts conform to the State practice.

It will thus be seen that "the old rules of practice and procedure in the State courts" to which petitioner makes reference (Pet. p. 14) are substantially the same as Rules 2, 8(a) and 54(c) of the Federal Rules of Civil Procedure and antedate them by approximately 89 years, and that by virtue of the Conformity Act the provisions of

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[3]The material portions of the sections of the Practice Act above referred to read as follows:

"1. There shall be in this State but one form of civil action, for the enforcement or protection of private rights, and the redress or prevention of private wrongs."

"39. The complaint shall contain * * *

2d. A statement of the facts constituting the cause of action in ordinary and concise language:

3d. A demand of the relief which the plaintiff claims. If the recovery of money, or damages be demanded, the amount thereof shall be stated."

"147. The relief granted to the plaintiff, if there be no answer, shall not exceed that which he shall have demanded in his complaint; but in any other case, the court may grant him any relief consistent with the case made by the complaint, and embraced within the issue."

said rules had previously been the rules governing federal courts in actions at law since 1872.

The Court of Appeals said:

> "If Londono had been defrauded his action would have been predicated on fraud, a tort, not upon a breach of warranty, an action on a contract. Dougherty v. California Kettleman Oil Royalties, 13 Cal. 2d 174, 183, 88 P. 2d 690, 694; Merchants Ice & Cold Storage Co. v. Globe Brewing Co., 73 Cal. App. 2d 828, 834, 167 P. 2d 503, 507; Fripo v. Pacific Mutual Life Ins. Co., 80 Cal. App. 122, 251 P. 657; 1 Cal. Jur. 2d, p. 625; 37 C. J. S. [Fraud, §94], p. 393; 24 Am. Jur., Sec. 254, p. 85." [R. 3490; 204 F. 2d 379.]

The authorities above listed support the proposition for which they are cited. All of them except Corpus Juris Secundum and American Jurisprudence are California authorities. It will be sufficient to refer briefly to *Dougherty v. California Kettleman Oil Royalties,* 13 Cal. 2d 174, 88 P. 2d 690, the first case cited by the Court of Appeals. In that case the defendant claimed that a prior judgment against it was an action *ex delicto* and that defendant Oschner and appellant's assignor, defendant Universal Oil & Co., were joint tort-feasors and that when the plaintiff settled with Oschner's estate, releasing the estate from liability, he released one of two joint tort-feasors and accordingly all joint tort-feasors were released. The trial court denied a motion to enter judgment in favor of appellant. The Supreme Court affirmed, pointing out that it was true that Oschner and appellants had acted fraud-

ulently in respect to the plaintiff and that those facts were alleged in the complaint. It continued:

> "The cause of action, however, was not predicated on that fraud * * *. There can be no doubt that Dougherty could have sued Oschner and appellant for damages for this and other frauds, but the point is he did not, but elected to sue for the enforcement of his contract with Oschner. It is elementary that a person injured under circumstances where he may sue in either tort or contract, may waive the tort and sue on the contract." (13 Cal. 2d 183, 88 P. 2d 694.)

If petitioner believed he was induced to enter into the agreement of purchase through representations which he thought were fraudulent, he had three alternatives: first, he could rescind the contract and recover from the Steel Company the purchase price of the wire; second, he could stand on the contract and recover damages if any for the loss resulting from the alleged fraud; third, he could ignore the fraud and have stood solely upon the contract and sue for damages for alleged breach of warranty. (*Campbell v. Birch,* 19 Cal. 2d 778, 791, 122 P. 2d 902, 909; *Burns v. Grosvenor Inglis Corp.,* 120 Cal. App. 688, 692, 8 P. 2d 546, 547-548; hearing in Supreme Court denied; *Westerfeld v. N. Y. Life Insurance Co.,* 129 Cal. 68, 73, 61 Pac. 667, 668.)

Petitioner unquestionably adopted the last course. This is shown by his conduct in connection with the wire in question, his pleadings, his pre-trial statement [R. 95-

96], his conduct of the trial, the findings of the court [R. 119-182], the judgment [R. 194-202] and his argument in the Court of Appeals.

Of course, in attempting to recover damages for alleged breach of warranty it was incumbent upon petitioner to prove under the substantive law of the State of California that the warranty alleged had been made and breached. This he failed to do, and the trial court compounded petitioner's error by permitting him to testify in regard to purported warranties which were not proven by legal evidence. Therefore, they cannot be regarded as existing in fact. Consequently, there is no evidence in the record that the wire Londono received from the carrier did not comply with the terms of his contract with the Steel Company as amended and there is no basis for the trial court's judgment awarding damages for breach of warranty.

The Court of Appeals was correct in reversing the judgment against the Steel Company.

III.

Petitioner Failed to Allege in His Complaint, Much Less Prove at the Trial, Any Act of the Bank Which Proximately Caused Any Damage to Him. The Case Was Tried and Decided Below on Grounds Which Made Irrelevant Any Question Concerning Any Act of the Bank.

The Court of Appeals, in reversing the judgment against the Bank, said:

> "Not only does Mr. Londono's complaint fail to allege any act of the Bank which proximately caused any damage to Mr. Londono, but the case was tried and decided below on grounds which make irrelevant any question concerning the bill of lading or any act of the Bank. Mr. Londono's basic contention below and in his same brief here at page 46 is that the court properly found (Tr. 152) 'that "at no time was there an acceptance of the wire" by Mr. Londono and "that he rejected all of it."'". [R. 3495-3496; 204 F. 2d 381.]

As part of his specification of error number 7 petitioner contends:

> "The Court of Appeals erred * * * (4) in ruling that no acts of the Bank were shown to have damaged Londono; and that he 'rejected' the wire, thus making 'irrelevant any question concerning the bill of lading or any act of the Bank.'" (Pet. p. 22.)

At page 35 petitioner, referring to the second sentence of the language just quoted from the opinion, asserts that a false quantity was injected into the reasoning for reversal. Petitioner says:

> "Had the evidence and the finding been that Londono *rejected* the wire in the sense of *refusing to re-*

> *ceive it and rescinding the contract,* this would not have exculpated the Bank * * *." (Pet. p. 35—Italics Petitioner's.)

It will at once be apparent that petitioner has misunderstood the portion of the opinion of the Court of Appeals above quoted. The Court of Appeals did not hold that because petitioner rejected the wire any question concerning the bill of lading or any act of the bank was irrelevant. Rather the Court of Appeals held that the case was tried and decided below on grounds which made irrelevant any question concerning the bill of lading or any act of the Bank. The court's reference to petitioner's contention that the trial court properly found that he had rejected the wire was apparently cited as an example of the way in which petitioner, as well as the trial court, had sought to avoid, as against the Bank, the legal results which flowed from petitioner's affirming his contract with the Steel Company, by his taking and selling the wire and by his suing the Steel Company for breach of warranty.

As shown in our statement of the case (*supra,* pp. 6 and 7) petitioner took the wire and sold it. In the fifth separate and complete defense of the Bank, the Bank pleaded that plaintiff had accepted said wire and appropriated a portion thereof to his own use as owner thereof and was estopped to claim damages against the Bank by reason of the alleged fact that the Bank paid out said sum of $214,000.00 to the Steel Company in disregard of said letter of credit [R. 85-86]. The Bank's contention before the trial court and the Court of Appeals was, that petitioner had taken a position inconsistent with his claim that the Bank owed him the purchase price of the letter of credit, less recoveries. The Bank grounded

this contention upon the fact that petitioner had accepted and sold the wire and the further fact that petitioner was relying on the ownership of the wire as a basis for his cause of action against the Steel Company, his cause of action against Matson Navigation Company and his separate action in admiralty against the United States Government.

The Bank contended before the Court of Appeals that the finding that petitioner had rejected the wire and that there was at no time an acceptance of the wire by him, was contrary to the evidence and directly in the teeth thereof, and that petitioner's acts were inconsistent with the ownership of the wire by the Steel Company and therefore an acceptance under Section 1768 of the California Civil Code.[4] It was in regard to petitioner's effort to sustain the contention that he had rejected the wire to which the Court of Appeals made reference in the portion of the opinion first quoted under this Point III.

The plain facts of the case are that petitioner did accept the wire from the Steel Company and that he did not reject it.

Had petitioner refused to accept the wire, or having accepted it, had returned or offered to return it to the Steel Company, he might have had a right to rescind the contract and sue the Steel Company for the purchase price. In such case, since he would not be claiming under the contract with the Steel Company, it is possible that he

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[4]Section 1768 of the California Civil Code reads as follows: "The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them."

could have alleged a claim against the Bank for the purchase price of the letter of credit. But petitioner did not elect to rescind the contract with the Steel Company. By accepting the wire and bringing this action against the Steel Company, in which he sued the Steel Company for alleged breach of the contract, he thereby elected to stand on the contract. Moreover, petitioner's action against Matson Navigation Company and his libel against the United States Government were necessarily based upon his ownership of the wire.

Petitioner would have had no ownership in the wire unless the purchase price was paid by the Bank. The cause of action against the Steel Company, the cause of action against Matson Navigation Company and the admiralty action against the United States Government were necessarily based on the proposition that petitioner affirmed the contract with the Steel Company and that he owned the wire. Since the whole case was tried and decided on that theory, the Court of Appeals was correct in saying that this made irrelevant any question concerning the bill of lading or any act of the Bank [R. 3495; 204 F. 2d 381].

Irrespective of whether the petitioner's action against the Steel Company was *on the contract* for breach of warranty or whether (as he now contends *in arguendo*) the complaint can be construed as an action for damages for fraud, the result is the same so far as the Bank is concerned. In suing for damages for fraud, petitioner would have affirmed the contract with the Steel Company. In *Kaluzok v. Brisson*, 27 Cal. 2d 760, 763, 167 P. 2d 481, 482, the Supreme Court of California said:

> "The gravamen of the present action is damages for deceit. By the action the plaintiffs did not elect

> to rescind the contract and restore the property to the defendants, thus effecting a reconveyance. Its purpose was not the cancellation of the deed or of the deed of trust. In electing the first remedy the plaintiffs seek an affirmance of the transaction and restitution to the extent of the damages suffered on account of the defendants' alleged fraud."

In *Hjorth v. Bernstein,* 44 Cal. App. 2d 561, 564, 112 P. 2d 643, 644, the District Court of Appeal said:

> "Appellant contends, secondly, that the law is well settled that a person claiming to be defrauded by false representations has a choice of two inconsistent remedies, to wit, he may elect to rescind the contract; or, to affirm it and claim damages. He cannot do both. We quite agree with appellant in this connection."

In *Bancroft v. Woodward,* 183 Cal. 99, 101-102, 190 Pac. 445, 446, the Supreme Court of California said that it was true

> "that a party induced to enter into a transaction by fraud, affirms the transaction when he brings an action for damages and because of the affirmance loses any right to disaffirm subsequently (*Stuart v. Hayden,* 169 U. S. 1 (42 L. Ed. 639, 18 Sup. Ct. Rep. 274)) * * *."

In that case, however, the court held that if a plaintiff ineffectually seeks to disaffirm, he does not thereafter lose the right to maintain an action for damages.

Petitioner contends that the decision of the Court of Appeals is in conflict with the principles universally applied to bank transactions and with decisions of Courts of Appeals in other circuits, and those of this court upon the obligation of banks under letters of credit (Pet. p.

14). He cites a number of cases (Pet. pp. 32-34) which he contends show that the decisions of the Court of Appeals was in error in reversing the judgment against the bank. In none of these did the buyer of the goods and the purchaser of the letter of credit accept goods and then attempt to recover from the issuer of the letter of credit the excess of the purchase price of the letter of credit over the value of the goods.

Petitioner also contends that in accepting the barbed wire and selling the same, he was merely mitigating damages (Pet. p. 34). The barbed wire, however, was not depreciating property and there was, therefore, no reason for him to mitigate his damages against the Steel Company, much less any supposed damages against the Bank.

The only case we have been able to find which is factually similar to the case at bar is a decision of the Court of Appeals for the Second Circuit in *Royal Card & Paper Co. v. Dresdner Bank*, 27 F. 2d 791. The decision in this case, we believe, answers petitioner's contention that the opinion of the Court of Appeals of the case at bar is at variance with the authorities and also petitioner's contention that he was entitled to accept and resell the wire in order to mitigate damages against the Bank.

In the case cited, plaintiff Royal Card & Paper Co., corresponds to petitioner and the defendant Dresdner Bank to respondent Bank, in the case at bar. There the plaintiff appealed from the action of the trial court in setting aside the verdict of the jury in favor of plaintiff and dismissing the action upon the merits. Dresdner Bank had agreed to honor drafts of the sellers under a letter of credit and the Court of Appeals accepted the jury's verdict as the equivalent of a finding that the Dresdner Bank had agreed to honor drafts only when the

invoices did not exceed certain specified prices. The Bank paid drafts although the prices were above those specified. Plaintiff accepted the goods. The Court of Appeals for the Second Circuit modified the judgment by striking out the words "upon the merits" and affirmed the judgment as thus modified. Judge Swan said that the conduct of the plaintiff "is inconsistent with the contention that title never passed to plaintiff" (27 F. 2d 794). Although it appeared that Royal Card & Paper Co. was certainly "mitigating" its damages against Dresdner Bank, Judge Swan nevertheless held that since plaintiff, instead of rejecting the goods had treated them as its own, it could not "put on defendant [Dresdner Bank] the loss it suffered by reason of such purchase" (27 F. 2d 794).

Petitioner further argues that if the Bank had obtained the required bill of lading he would have had an action against Matson Navigation Company for delivery of misdescribed merchandise [Pet. p. 34]. Specifically his contention appears to be that the bill of lading did not show the rusty condition of the wire and therefore it was a misdescription, and he relies on section 102 of the Federal Bills of Lading Act (49 U. S. C., Sec. 102). Petitioner purchased the wire from the Steel Company while it was en route to Los Angeles. He was dealing on the basis of the goods, rather than on the basis of a bill of lading. Indeed, the very contract which, on July 12, 1946, petitioner entered into with the Steel Company [R. 31] makes no reference to a clean bill of lading—on the contrary the agreement expressly contemplated the presence of rusty wire, for it allowed petitioner to reject not more than 300 tons "due to excessive weathering" [R. 31]. Furthermore, petitioner bought only a part of the 2300 ton shipment, knowing

that it was en route from Honolulu. It follows he did not rely upon any bill of lading as to the quality of the wire to be furnished by Dulien.

There is not a scintilla of evidence in the record that petitioner would have received a different kind of wire than he did receive if the Bank had obtained the required bill of lading from the Steel Company.

The Court of Appeals was correct in ruling as it did that petitioner's complaint failed to allege any act of the Bank which proximately caused any damage to petitioner [R. 3495; 204 F. 2d 381].

As his Specification of Error Number 8 petitioner asserts that the Court of Appeals erred in denying him his right to recover from the Bank because he had not sued the Bank to recover the purchase price of the letter of credit on the ground of total absence of consideration or mutual mistake (Pet. p. 22). In his argument in support of this specification of error he contends that in essence his complaint against the Bank was "to recover the sums he paid for the letter of credit and the service charge, lessened by receipts in mitigation" (Pet. p. 37). In making this contention petitioner fails to realize that once he had accepted the wire (to which he was entitled only because the Bank had paid for it) and because he had sued the Steel Company for breach of warranty, thereby ratifying the action of the Bank, and because he had sued Matson Navigation Company and the United States Government on theories which were necessarily predicated on his ownership of the wire, he had no right to recover from the Bank any part of the purchase price of the letter of credit.

The Court of Appeals was not concerned, and the point is not involved in this proceeding as to what would have

been petitioner's rights against the Bank had he rejected all the wire and had not exercised any ownership over it. The plain fact is that petitioner did accept the wire and handled it as his own, thereby ratifying the act of the Bank in paying the Steel Company for the wire.

The Court of Appeals was right in holding that

> "the case was tried and decided below on grounds which make irrelevant any question concerning the bill of lading or any act of the Bank." [R. 3495; 204 F. 2d 381.]

Conclusion.

It is respectfully submitted that the Court of Appeals in reversing the judgment against the respondents applied the substantive law of California and did not depart from the Federal statutes or the Federal Rules of Civil Procedure, and that it neither departed from the accepted and usual course of judicial proceedings nor required such departure by the District Court. We further submit that petitioner has not substantiated any of the reasons he has assigned for the granting by this court of a writ of certiorari. Accordingly, his petition for such writ should be denied.

Respectfully submitted,

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FILED
SEP 21 1953
HAROLD B. WILLEY, C

No. 282

In the

Supreme Court of the United States

OCTOBER TERM, 1953

J. B. LONDONO, *Petitioner,*

vs.

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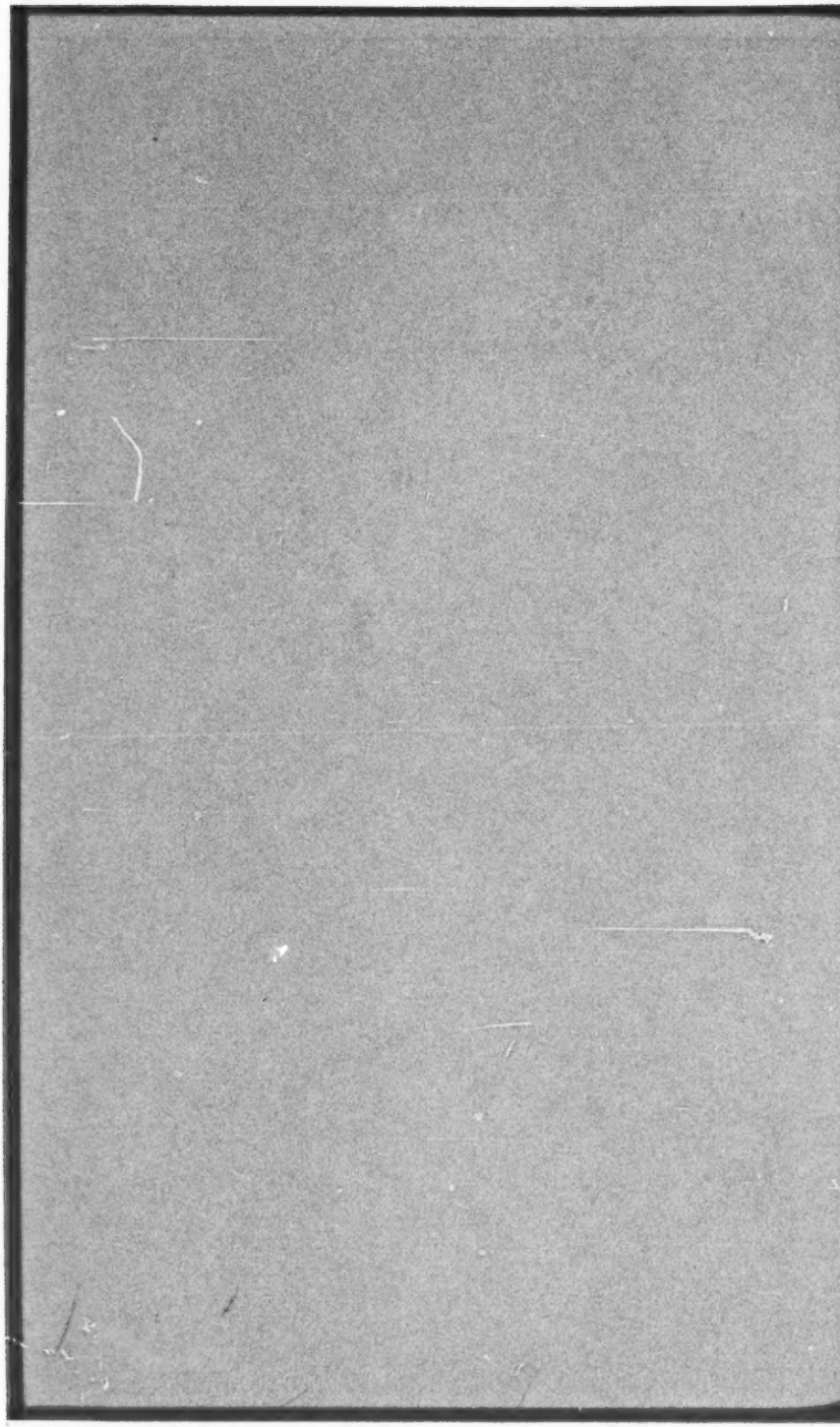

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OPINIONS BELOW

The District Court's opinion (R. 3029) is not reported. The opinion of the Court of Appeals for the Ninth Circuit is printed in the record (R. 3487-3496), and is reported at 204 F. 2d 377.

JURISDICTION

The jurisdictional requirements are set forth in the Petition.

ADDITIONAL STATUTES INVOLVED

(In addition to those printed in the text or footnotes or in the Petition)

This case involves proper construction to be given certain California statutes including the following one not printed in Petition and incidentally certain Federal Rules of Civil Procedure. These will be discussed in argument.

California Civil Code §3343:

> "§3343. (*Damages for fraud in the purchase, sale, or exchange of property.*) One defrauded in the purchase, sale or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received, together with any additional damage arising from the particular transaction.
>
> "Nothing herein contained shall be deemed to deny to any person having a cause of action for fraud or deceit any legal or equitable remedies to which such person may be entitled."

The foregoing statute was authoritatively construed in *Bagdasarian v. Gragnon,* 31 Cal.2d 744, 192 P.2d. 935.

RESTATEMENT OF MATTER INVOLVED

Respondent Dulien corporations[1] herewith restate the matters involving them[2].

On July 12, 1946, plaintiff Londono and defendant Dulien-Cal., after prior negotiations, entered into a written contract (Ex. 2, R. 31, 41). The contract reads in part:

> "We confirm having sold to you the following goods under the terms and conditions as stated below: Commodity. Unused Government surplus barbed wire, as purchased by seller from Interior Department."

No reference is made in said contract to quality or condition of the wire, and no reference is made to purchase by sample[3]. The District Court stated that there was no claim by plaintiff Londono that he did not read

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[1] Dulien Steel Products, Inc., of California, a California corporation, sometimes herein referred to as "Dulien-Cal.," and Dulien Steel Products, Inc., a Washington corporation.

[2] Respondent Citizens National Trust & Savings Bank of Los Angeles will file a separate brief as to all matters in the Petition affecting it.

We concur in its more detailed statement of the case and contentions. No attempt is made to describe findings of fact challenged on the ground that they were not supported by substantial evidence. The Court of Appeals found it unnecessary to pass on these contentions after deciding the basic law question of the case: The application of the California parol evidence rule to the contract involved.

[3] The contract contained a provision indicative of its "as is" character by providing for only a limited right of rejection (instead of the unlimited right of rejection that would otherwise exist in case of breach of

and understand the terms of the sales contract (R. 792-3).

The contract called for 2700 tons. This was reduced by mutual agreement to 2000 tons (Fdg. V., R. 126). It was stipulated at trial that the commodity involved in this suit was "unused surplus barbed wire purchased by the defendant, Dulien Steel Products, Inc., of California, from the Interior Department of The Government" (R. 258).

The wire arrived by steamship July 26, 1946 (R. 1250-52). The wire was paid for by letter of credit obtained by Mr. Londono from respondent bank in the sum of $214,000 and delivered to the seller on July 27, 1946 (R. 367, 679, Ex. 5). The bank paid the sums called for by the letter of credit on July 29, 1946, on receipt of a paid freight bill rather than an order bill of lading called for therein (R. 981-9, 2538-9). Mr. Londono inspected the wire on various occasions while the cargo was being unloaded and thereafter during the month of August, 1946, (R. 496-500, 555, 594, 627, 686-7, 703, 730, 742). Taking the position that he was the owner of the wire (R. 435, 616), he took delivery by virtue of his paid freight bill (R. 925, 1048), resold and reshipped or arranged to reship approximately 1080 tons of the wire to Columbia, South America (Ex. 60-A, C-Z-1), before asserting on September 4, 1946, that he was rejecting the wire (R. 455). These respondents did not acquiesce in the claimed rejection.

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warranty), the provision reading "Acceptance of material subject to rejection by buyer of not more than 300 tons due to excessive weathering." Excessive weathering means excessive rust (R. 2924, 792).

Mr. Londono resold the balance of the wire. He then sued the seller for damages for shortage in quantity delivered and damages alleged by him to be "the direct and proximate result of defendant Dulien's alleged breach of warranty" (R. 13) the total damages claimed being in the sum of $197,552.66 (R. 29).

By the allegations of his complaint[4], his pretrial statement of the issues[5] and evidence of damages in conformity with California Civ. Code §1789(7)[6] plain-

[4] Plaintiff's complaint describes his first cause of action as one for "damages for breach of warranty" (R. 3). He incorporates by reference and relies upon the written contract (Ex. 2) as subsequently modified (R. 7). He alleges the existence of a warranty of quality (R. 6-7). The damages he claims are alleged to have been the proximate result of "Dulien's failure to deliver the quantity of wire purchased by plaintiff and its breach of warranty as to said wire * * * " (R. 13-15). Although he also alleges he was induced to enter into the contract as the result of misrepresentation on the part of Dulien as to the quality of the wire (R. 10), he obviously does not rely upon fraud (the tort of deceit) as the gravamen of his complaint if only because the measure of damages he adopts is inapplicable to the tort of deceit. *Mumford v. Mechanics' Loan & Savings Co.*, 39 Ga. App. 204, 146 S.E. 655 (See Br. p. 23 *infra*).

[5] He states therein:
"Londono, in his first cause of action, sues Dulien for damages for breach of warranty."
As the law applicable, he cites and relies on remedies for breach of warranty, namely, Cal. Civ. Code §1789 (1)(b), (6), (7), and §1790 (R. 96-7).

[6] Cal. Civ. Code §1789(7):
"§1789. *Remedies for breach of warranty.*
"(7) In the case of breach of warranty of quality, such loss, in the absence of special circumstances

tiff elected to affirm the contract by bringing an action for damages for breach of the contract so affirmed. The District Court stated, when he settled the findings, that the case "was tried as a breach of warranty case" (R. 3218).

In conformity with plaintiff Londono's theory of damages for breach of warranty, the Court found (Fdg. V, R. 126) that there was a contract for the sale of wire by sample and warranty of quality based upon statements allegedly made to Mr. Londono prior to the execution of Ex. 2; that this contract was breached Fdg. XXXVII, R. 172); that Londono suffered damage by reason of breach of warranty (Fdg. XXVII, R. 158; Fdg. XXVIII, R. 158; Fdg. XXXVII, R. 172). The court awarded plaintiff damages based upon breach of warranty as stated (Cal. Civ. Code §1789(7)) instead of the less favorable damages recoverable for fraud (Cal. Civ. Code §3343 (Br. p. 2, *supra*)). Although there are findings of fraud, such as Fdg. XLV (R. 177) (challenged but not ruled upon below), the statement in Fdg. XLV that the plaintiff relied on representations "to his damage, as aforesaid" is damage measured by the rules of breach of warranty (Fdg. XXVII, XXVIII, XXXVII) (R. 158, 172), judgment for which was then awarded.

On appeal, in defending the judgment awarded him,

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showing proximate damage of a greater amount, is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty."

Mr. Londono presented his case as one for breach of warranty under Cal. Civ. Code §1789(7). He made this plain both in his brief against appellant Dulien corporations[7] and against appellant Bank[8].

In his Petition to this court, Mr. Londono claims that his action was predicated upon fraud, his damages being measured "as for breach of warranty" (Pet. 6, 7),

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[7] Page 3, he stated, "This action by Londono was against Dulien for damages for breach of warranty of the quality of the wire: * * * "

Page 44, "Londono's net loss, therefore, as of July 21, 1946, was the consequent difference between said value as warranted and said net value as delivered, or $181,699.37 (Civ. Code, §1789(7)), for which the court found that Dulien was liable to plaintiff as of July 29, 1946 (Fdg. XXVIII)."

On page 142, after referring to F.R.C.P., Rule 8(a)(2), he stated, "The complaint was for damages for breach of warranty."

Page 143, "The fact that the warranties were fraudulently made does not result in a denial to plaintiff Londono of the right to have damages measured by the rule in Civil Code, Section 1789, Subdivision (7), 'in a case for breach of warranty of quality'."

"Dulien * * * correctly states that 'plaintiff must rely upon the measure of damages applicable to breach of warranty.' Plaintiff did so rely throughout the trial and does now."

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[8] Brief of Appellee, J. B. Londono, in answer to appellant Citizens Bank, page 57, "The Bank's statement that 'the case at bar was tried on the theory of breach of warranty' is true only as to the cause of action against Dulien * * * the causes against the Bank and Dulien were and are separate, distinct and independent causes of action in every respect, the one based on the letter of credit contract and the other based on the purchase (with warranty) contract."

and that the judgment for such damages should be affirmed, not reversed, as it was by the Court of Appeals.

SUMMARY OF ARGUMENT

The argument is summarized in the brief headings set forth in the index.

ARGUMENT

Basically, Mr. Londono contends:

1. That under California law, in an action for breach of warranty of quality of 2,000 tons of "unused government surplus barbed wire as purchased by seller from Interior Department," parol evidence of warranty of quality or sale by sample predicated upon representations made in negotiations preceding the execution of the contract is admissible both on grounds of ambiguity in the quoted language and on account of claimed fraud practiced in the inducement of the contract.

2. Under California law, assuming that the action involved is one for fraud or deceit in the inducement of the contract, parol evidence of warranty of quality and sale by sample, predicated upon representations made in negotiations preceding the execution of the contract, is admissible so as to permit the recovery of damages based upon breach of warranty of quality under Cal. Civ. Code §1789(7); that, therefore, the judgment is correct in result and should be affirmed.

We shall now point out that plaintiff is wrong on both of his basic contentions; that the Court of Appeals was right in reversing the judgment of the District Court in conformity with the substantive law of Cali-

fornia. We shall further point out that the Federal Rules of Civil Procedure, particularly Rule 2, 8(a) and 54(c) relied on, have no bearing on this matter.

I.

The Decision of the Court of Appeals Was Clearly Correct and in Conformity with California Law

I. Question No. 1 (Pet. 16)

We admit, having never contended otherwise, that the Federal District Court is required to follow the substantive law of California. We contend, and will point out in argument, that because the District Court did not do so, the Court of Appeals correctly reversed the judgment of the District Court.

II. Question No. 2 (Pet. 16) (Errors 1 and 2, Pet. 21)

A. *Petitioner's contentions as to error being predicated upon a basic misconception in the application of the parol evidence rule, the errors claimed are not well taken.*

Petitioner contends the Court of Appeals misapplied the rules relative to the admissibility of parol evidence under California law. He claims there are two rules, as follows:

1. That where no fraudulent inducement is involved and the contract, complete on its face, makes no provision for warranty or sale by sample, parol evidence of warranty is inadmissible. It is said that cases such as *Germain Fruit Co. v. J. K. Armsby Co.*, 153 Cal. 585, 96 Pac. 319, and cases cited therein (*Harrison v. Mc-*

Cormick, 89 Cal. 327, 26 Pac. 830; *Gardiner v. McDonogh,* 147 Cal. 313, 81 Pac. 964 (Pet. 21, 23)), fall within this classification.

2. That where fraudulent inducement (common law deceit) is involved, even though the contract is complete on its face and makes no provision for warranty of quality or sale by sample, parol evidence of fraudulent representations (fraudulent warranty) is admissible. It is claimed that cases such as *Ferguson v. Koch,* 204 Cal. 342, 268 Pac. 342, followed in *American Soda Fountain Co. v. Martin,* 100 Cal. App. 43, 279 Pac. 680, 682, and *Morris v. Harbor Boat Building Co.,* 122 Cal. App.(2d) 882, 247 P.(2d) 589, fall within this classification (Pet. 16, 17, Footnote 3, 5).

The basic error in petitioner's statement of the matter is his failure to distinguish between the rules as to admissibility of parol evidence when the action is predicated *upon the contract,* and remedies for its breach, and when the action is predicated *not upon the contract,* but upon the impeachment, rescission or avoidance of the contract or defense against the enforcement of the contract on the ground that the contract is void or voidable on account of fraud. Thus, *Ferguson v. Koch, supra,* and *American Soda Fountain Co. v. Martin, supra,* were both actions brought by a plaintiff to enforce a contract in which the defendants successfully asserted by way of defense that the contract sought to be enforced was induced by fraudulent representations. In each of those cases, parol evidence of fraud was admissible on behalf of the defendant in order to *avoid*

the contract, *not* to enforce it. Therefore, in *Ferguson v. Koch, supra* (p. 345), the court stated:

> "* * * There is no such sanctity surrounding a writing that parties may not be permitted to go back of it and show that there was such fraud practiced in the procurement of the same as to *vitiate* the writing * * * ." (Emphasis supplied.)

In *American Soda Fountain Co. v. Martin, supra,* the court (p. 682) quoted with approval from *Ferguson v. Koch* the following:

> "It is equally well settled, however, that a writing may be *impeached* for fraud, and a parol warranty really made may then be relied upon * * * ." (Emphasis supplied);

obviously relied upon (as in the *American Soda Fountain Co.* case) to impeach the contract, not to enforce it.[9] Petitioner cites no California case in which, in an action for fraud, recovery was allowed for breach of a fraudulent parol warranty treated as a contractual obligation. As stated in *Crook v. O'Shea,* 126 Neb. 67, 252 N.W. 456:

> "When fraudulent promises act as the inducement to the execution of a written contract, the remedy is for fraud, and not upon the oral promises as a contractual obligation."

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[9] *Hodgkins v. Dunham,* 10 Cal. App. 690, 103 Pac. 351 (Pet. 24), was an action for fraud in which a bill of sale was impeached for fraud. It was distinguished in *Lamb v. Otto,* 51 Cal. App. 433, 197 Pac. 147, 148—an action for breach of a bi-lateral written contract in which parol evidence of warranty of quality was held inadmissible, the court citing the *Germain Fruit Co.* and *United Iron Works* cases (Br. p. 16). *Jones v. Grieve,* 15 Cal. App. 561, 115 Pac. 333 (Pet. 24), was an action to cancel a contract on account of fraud.

Morris v. Harbor Boat Building Co., supra, was an action for deceit, the appeal being concerned with whether a complaint stated a cause of action. As the appellate court said (p. 593):

> "* * * The issue before the trial court was simply whether the complaint stated a cause of action for fraud which would *vitiate* the written contract."[10] (Emphasis supplied.)

After an exhaustive study of the decisions, the theory of the rule of admissibility of parol evidence is set forth as follows in 56 A.L.R. 32-4:

> "In the class of cases under consideration, in which parol or extrinsic evidence is held admissible to show fraud inducing a written contract, notwithstanding the parol-evidence rule, the courts have pointed out that the action is not upon the contract, to enforce a warranty or asserted right at variance with the terms of the contract, in which case the evidence would be inadmissible, but to avoid the contract, and to defeat it on account of the fraud, or to recover for fraud independent of the contract; in other words, the gravamen of the action or defense is the fraud, not the contract itself."

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[10] When a court speaks of a defrauded party affirming the contract by retaining what he has received and suing for his damages, the court does not thereby mean suing for damages for breach of the very contract he seeks to vitiate. He obviously cannot both enforce his contract and at the same time vitiate it by claiming fraud. *Gonsalves v. Hodgson,* 220 P.(2d) 560 (Cal. App.). A similar rule prevails elsewhere; *Robinson v. McAlhaney,* 214 N.C. 263, 199 S.E. 26; *Bergman v. Wapello Coal Co.,* 200 Iowa 419, 203 N.W. 697, *Morehouse v. Northrop,* 33 Conn. 380, 89 Am. Dec. 211; *McCullough v. The American Workmen,* 200 S.C. 84, 20 S.E.(2d) 640.

B. *Londono, having been awarded damages for breach of contract established by incompetent and immaterial evidence, the judgment was properly reversed by the Court of Appeals.*

In view of the foregoing discussion, it is pertinent to inquire: Is Mr. Londono seeking to recover independently of the contract, to vitiate it, to avoid it, or to defend against the sales contract on the ground of fraud? Or is Mr. Londono seeking to enforce the contract (embodying therein the warranty he claims) by seeking to recover damages for breach of the contract he thus seeks to enforce? If he is seeking to enforce the contract, he must confine himself to the contract remedy so elected by him. 28 C.J.S. 1102.

The Court of Appeals necessarily concluded from an examination of the history of the litigation (including the nature of the findings and judgment entered), that Mr. Londono was seeking to recover damages for breach of contract. It had a right to reach this conclusion on two grounds, either of which was sufficient: First, by consideration of the pleadings, the evidence, the findings and judgment.[11] Second, because under California

[11] We agree that the nature of Mr. Londono's action is not to be determined by the caption of his complaint reading "Damages for Breach of Warranty" (R. 3) or by his prayer (R. 29). The Court of Appeals made no such determination. The implied suggestion that the Court of Appeals did so in conformity with California's state practice is without foundation. Not only did the court not purport to follow California state practice, but even had it done so, it would have looked to the allegations of the complaint without regard to caption or prayer to determine whether or not a cause of action and what kind of a cause of

law (the court cited *inter alia, Dougherty v. California Kettleman Oil Royalties, Inc.,* 13 Cal.(2d) 174, 183, 88 P.(2d) 690, 694 (R. 3490), Mr. Londono, faced with two inconsistent remedies for the claimed fraud, elected to adopt the remedy of breach of contract because if sustained it would permit a greater recovery than would have been the case in an action for fraud.

The obligation to choose the remedy to be pursued has nothing whatsoever to do with mechanics of pleading. Just as such obligation survived the institution of the code system of pleading, so it continues to survive the procedural practice required under the Federal Rules of Civil Procedure.[12] The fact that one is permitted to

[12] That the substantive doctrine of election between inconsistent remedies is not dependent upon rules of pleading, particularly those relative to joinder of inconsistent causes of action, is not only indicated by the fact that California, since prior to 1872, has been a code-pleading state permitting such joinder and has nevertheless recognized and applied the doctrine of the election of remedies, but the principle has been expressly recognized. *E.g., Bischoff v. Hustiford State Bank, et al.,* 191 Wis. 312, 218 N.W. 353. In *Holden v. American News Co.;* 52 F. Supp. 24, 31, the court said of analogous rule 8(e) F.R.C.P. dealing with permitting inconsistent defenses by answer: "The giving of full recognition to that rule does not permit a defendant to avoid taking a stand during the proceedings as regards utterly irreconcilable defenses." If petitioner claimed fraud, he had remedies of rescission, breach of contract or tort. He chose the remedy of breach of contract.

action was stated. *United States v. Fallbrook Public Utility District,* 101 F.Supp. 298, 301. If there was any doubt, the caption and prayer, as well as the allegations, might be resorted to solely for the purpose

simultaneously plead inconsistent claims doesn't do away with the necessity of finally choosing between them. The obligation to choose results from the substantive principle that one cannot take inconsistent positions; that since an action for fraud and an action for breach of warranty constitute alternative irreconcilable remedies, one being a remedy *off* the contract, and the other being a remedy *on* the contract, the plaintiff must elect, at least no later than by the time of the judgment, which remedy he will pursue if only because the measure of relief is different. *Gonsalves v. Hodgson,* 220 P.(2d) 560 (Cal. App.) (See footnote 10).

In this case, Mr. Londono claiming the right to recover damages for breach of contract, his claims of fraud became surplusage (*McCullough v. The American Workmen,* 20 S.E. 2d 640) and did "not convert a contract action into a tort action." (*Dougherty v. California Kettleman Oil Royalties, Inc.,* 13 Cal.2d 174, 183, 88 P.2d 690, 694).

The Court of Appeals, in effect, held (and petitioner

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of determining what the plaintiff's theory of the action was and what kind of relief the plaintiff considered himself entitled to receive. *Browne v. Ulrich,* 86 Cal. App.(2d) 367, 195 P.(2d) 804. Here, however, in reversing the judgment below, it was illuminating to look at the findings; to note that Finding V purports to set out the contract, damages for breach of which is awarded; and to look at the findings relative to damages for breach of warranty found to have been proximately caused by breach of warranty. Such findings are consistent only with an action for breach of warranty and if there is no warranty, then the damages awarded were improperly awarded and the judgment correctly reversed.

cites no holding to the contrary) that in an action for breach of contract parol evidence of warranty, which is otherwise inadmissible under the parol evidence rule, does not become admissible because fraudulently given. The California law fully supports this view. In *United Iron Works v. Outer Harbor Dock & Wharf Co.,* 168 Cal. 81, 141 Pac. 917, the court refused to permit parol evidence of fraudulent representations for the purpose of adding a warranty to the contract sought to be enforced by action.

Petitioner then asserts that the case of *Yuba Manufacturing Co. v. Stone,* 39 Cal. App. 447, 179 Pac. 418, cited by the Court of Appeals after the words "See also," was declared not to be the law in *Ferguson v. Koch.* Petitioner overlooks the fact that the *Yuba Manufacturing Co.* case also decided other points of law pertinent to the conclusion of the Court of Appeals in an action for breach of contract, and not overruled, including the rule that a written contract supersedes any negotiations or stipulations concerning its subject matter which preceded or accompanied the execution of the instrument. The Court cites *El Zarape Tortilla Factory v. Plant Food Corp.,* 90 Cal. App. 2d 336, 203 P. 2d 13, to the same point (R. 3491).

Germain Fruit Co. v. J. K. Armsby Co., 153 Cal. 585, 595, 96 Pac. 319, 323, on which the Court of Appeals expressly relied, and from which it quoted extensively, has never been overruled expressly or impliedly and the Court of Appeals was right in relying upon it in reversing the judgment of the District Court.

C. The warranty of quality claimed, even if fraudulently given, not being proved by competent evidence, the judgment was properly reversed.

Contemplating that his contentions reviewed above might be rejected, Petitioner then contends that the representations relied upon by him, being inducing affirmations of quality, become express warranties by virtue of statute (Cal. Civ. Code §1732) (Pet. 25) and (impliedly) that the damages awarded for breach of such warranty were proper. What Petitioner overlooks is that the question is not whether they are express warranties, but whether in an action for breach of the written contract relied on, they were proved by competent evidence. Cal. Civ. Code §1732 merely provides in substance the usual Sales Act provision that any affirmation of fact relating to the goods is an express warranty if the natural tendency of such affirmation is to induce the purchase.[13] But this code provision has not done away with the parol evidence rule. In the *Germain* case the samples exhibited prior to the execution of the contract (*Germain Fruit Co. v. J. K. Armsby Co.*, 153 Cal. 585, 96 Pac. 319) were affirmations of fact

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[13] This amended in 1931 an earlier statutory definition of express warranty but with little practical difference in result. 7 So. Cal. L. Rev. p. 98, discussing the amended statute, said this:

"From this, it appears that only one element has been changed, i.e., instead of inferring from circumstances an intent of the seller to warrant, the affirmation or promise must be found to have a natural tendency to induce the buyer to make the purchase. Query: whether the result in a given case would be different under the new provisions."

and constituted express parol warranties by sample. Nevertheless, the court held that evidence of such warranties by sample were not admissible because excluded by the parol evidence rule.

In other jurisdictions, it has been expressly held that under similar statutory definitions of warranty, the parol evidence rule excludes proof of parol warranty in the case of a written contract complete on its face and making no provision for such warranty. *Marmet Coal Co. v. People's Coal Co.*, 226 Fed. 646, 650; *Hamilton Iron & Steel Co.v . Groveland Mining Co.*, 233 Fed. 388, 392; *Glackin v. Bennett*, 226 Mass. 316, 115 N.E. 490, 492.

In the last case, the court said:

> "An express warranty, which is an affirmation of fact inducing the sale (Sales Act, St. 1908, c. 237, §12), cannot be added to the written agreement, under the rule permitting an agreement by parol, which is collateral to the contract and on a distinct subject, to be proved."

In 2 Mechem on Sales, §1254, the rule is stated:

> "If, therefore, such a writing exists between the parties (complete on its face), and it contains no *warranty at all,* no warranty can be added by parol; if it contains a *warranty of some kind or to some extent,* parol evidence will not be admitted to extend, enlarge or modify that which the writing specifies." (Emphasis ours.)

This rule has been cited with approval by the California Supreme Court. *Calpetro Producers Syndicate v. Charles M. Woods Co.*, 206 Cal. 246, 251, 252; 274 Pac. 65, 67; *United Iron Works v. Outer Harbor Dock & Wharf Co.*, 168 Cal. 81, 141 Pac. 917, 920.

It is respectfully submitted that Errors 1 and 2 are not well taken.

III. Questions Numbered 3 and 4 (Pet. 17); Errors 3 and 4 (Pet. 21)

The commodity sold being unambiguously described, the error claimed is not well taken.

Proceeding upon the unstated assumption that his action is one for breach of contract, *i.e.*, warranty, Petitioner contends (1) that the parol evidence of warranty and quality of sale by sample was admissible because the phrase "Unused government surplus wire as purchased from the Interior Department" was ambiguous, and that the Court of Appeals and the trial court so held (Pet. 17), and (2), if admitted, the evidence would have proved the existence of a warranty of quality for breach of which he was entitled to recover damages (Pet. 27).

These contentions are predicated upon a misreading of the opinion of the Court of Appeals and a failure to distinguish between the claimed existence of a warranty and the proof of its existence by competent evidence.

In claiming that the Court of Appeals held the quoted language ambiguous and that, therefore, the parol evidence rejected should have been admitted, Mr. Londono selects certain phrases from the opinion of the court and discusses them out of context. The court first stated:

> "In identifying the subject matter, parol evidence would properly be admitted to identify the

portion of the wire 'as purchased by the selle from the Interior Department.' "

In making this statement, the court had just pointe out that the trial court had admitted the evidence fo the purpose of showing "whether or not the conditio of the wire as purchased is the same at the time of pur chase, at the present time, and so on." Identificatio is one thing; identification plus a warranty of qualit is another. When, therefore, the court later says (R 3489): "The trial court in this respect was correct. I admitted evidence, parol and physical, showing th quality of the wire agreed to be sold," the court is mere ly referring to the agreement set forth in the contract not to any parol agreement contemporaneous with o prior to the written contract finally executed. This i apparent from the next sentence which reads, "How ever, the plaintiff was not satisfied to limit the evidenc to a mere showing of the agreed quality." The word "agreed quality" mean merely the quality of wire "a purchased by seller from the Interior Department" be cause that was the kind of wire that the parties ha agreed in the contract to sell and purchase. Still later when the Court of Appeals said that the District Cour "was in error in admitting parol evidence for purpose other than clarification of the terms of the agreement," all that the court obviously meant is that it was in erro in admitting parol evidence for purposes other tha identifying the portion of the wire "as purchased b seller from Interior Department" sold to Londono.

In the similar case of *Germain Fruit Co. v. J. K Armsby Co.*, 153 Cal. 585, 96 Pac. 319, parol evidenc

was admitted for the purpose of identifying the subject matter, but the court refused to permit it for the further purpose of adding a warranty of quality not contained in the written contract. The difference between the opinion of the District Court and the opinion of the Court of Appeals on this matter of claimed ambiguity is that the District Court was not content with merely holding that the evidence should be admitted for the purpose of identifying the commodity to be sold described in the contract. It went further and held that the parties were at liberty in such case to add a provision for parol warranty and sale by sample. This the Court of Appeals said it could not do, because by so doing, parol evidence was used "to rewrite the contract of sale for the parties. This is violative of the settled law of California."[14] Mr. Londono cites no case in California which suggests or requires the conclusion that the opinion of the Court of Appeals holding that the language "as purchased by seller from Interior Department" does not permit receipt of evidence of parol warranty, is contrary to California law.

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[14] General principles quoted from *Bartel v. American Dental Supply Co.*, 114 Cal. App.2d 905, 251 P.2d 16, 17; *McIntyre v. Angel*, 109 Cal. App.2d 425, 240 P.2d 1047; and *Union Oil Co. v. Union Sugar Co.*, 31 Cal.2d 300, 188 P.2d 470, 473, do not involve an application of those principles to the language involved in Ex. 2. See *Seitz v. Brewers' Refrigerating Machine Co.*, 141 U.S. 510, 12 S.Ct. 46, holding that a written contract for a refrigerating machine "as constructed by the party of the first part" is unambiguous, and parol evidence of a warranty is inadmissible. No warranty, express or implied, exists in an "as is" contract. 46 Am. Jur. 501, §319.

His next contention is that the parol evidence constitutes inducing affirmations of the seller showing the quality of the wire agreed to be sold and constitutes an express warranty of quality by force of Cal. Civ. Code §1732 and that therefore Mr. Londono is entitled to recover for breach of that warranty. We have already pointed out that this contention confuses the existence of warranty with the competency of evidence to prove its existence (Br. p. 17, *supra*).

It is respectfully submitted that Errors 3 and 4 are not well taken.

IV. Questions Nos. 5 and 6 (Pet. 18); Errors 5 and 6 Pet. 22, 28)

Assuming plaintiff's action was predicated upon proved fraud, the damages awarded are damages for breach of warranty so that the judgment was properly reversed

Petitioner now contends that his action was predicated on fraud; that he is entitled to the damages awarded under Cal. Civ. Code §1789(7), and that the judgment should be affirmed because correct in result.

The basic error of these contentions lies in the fact that, assuming (notwithstanding the history of the matter heretofore reviewed) the action was to recover damages by reason of fraud, the judgment for damages is predicated not upon Cal. Civ. Code §3343, as construed in *Bagdasarian v. Gragnon,* 31 Cal.2d 744, 192 P.2d 935, adopting the "out-of-pocket" rule of damages, but is predicated upon Cal. Civ. Code §1789(7), adopting the "benefit of the bargain" rule of damages,

sometimes called the "warranty rule."[15] The Supreme Court of California points out in the *Bagdasarian* case, after an exhaustive review of the earlier decisions, that since the enactment in 1935 of Cal. Civ. Code §3343, the "benefit of bargain" rule, formerly prevailing in California in fraud cases, no longer obtains; and that the more limited "out-of-pocket" rule of damages applies. The court cites with approval the earlier case of *Jacobs v. Levin,* 58 Cal. App.2d 913, 137 P.2d 500, a case which distinguishes between the more ample measures of damages in actions for breach of warranty and the more limited measure of damages in actions for fraud in the purchase, sale or exchange of property. If, therefore, the court accepted Petitioner's statement (Pet. 28) that "The action *was* 'predicated on fraud,' " it would still be necessary to approve the reversal of the judgment below because the judgment is excessive, being based, as the Petitioner himself concedes, on Cal. Civ. Code §1789(7) (Pet. 7). If it be true, therefore, that the judgment, if correct, must be affirmed on appeal even though the trial court relied upon a wrong ground (Pet. 31), the rule does not avail the Petitioner here because the damages awarded are not correct even in an action predicated upon fraud.

It will be seen, therefore, that Rules 2, 8a and 54c, F.R.C.P., have no bearing upon the questions as to whether the Court of Appeals was correct in reversing the judgment and remanding the case to the trial court for the purpose of taking "further proceedings con-

[15] *Oliver v. Benton,* 92 Cal. App.2d 853, 205 P.2d 375, 376.

sistent with the views herein expressed." What the Court of Appeals has done is to hold that the District Court could not proceed upon the assumption that in an action for breach of warranty, parol evidence of warranty of quality not contained in the contract (and also contrary to its "as is" character) was competent to establish the existence of that warranty and to justify the imposition of damages predicated upon breach of that warranty.

None of the cases cited by Petitioner on this matter of federal procedure have any bearing on the question as to whether or not the Court of Appeals correctly reversed the judgment of the District Court. The Court of Appeals' reversal of the case was not predicated upon the caption of the complaint, nor the measure of damaged prayed for, nor the style in which the complaint was cast. The court looked at the findings and the judgment based thereupon. It concluded that Fdg. V purporting to find the terms of the contract, is not supported by competent evidence. Since the relief awarded by the judgment was predicated upon the existence of the contract, as found in Fdg. V, and no such contract had been proved, the Court of Appeals properly reversed the judgment. The errors claimed do not exist and the reversal was clearly right.

II.

The reasons relied on by Petitioner for the issuance of writ of certiorari are without foundation.

Reason I. (Pet. 11-12)

Petitioner contends that the Court of Appeals decided an important question of local law in a way conflicting with applicable (California) decisions. We have pointed out that this contention is unwarranted. (Br. p. 8, *supra.*) The decision of the Court of Appeals is in conformity with California law, and Petitioner has not shown that the decision violates that law.

Reason II. Pet. (13)

Petitioner contends that the Court of Appeals decided an important question of federal law in a way conflicting with applicable decisions of the Court of Appeals in other circuits, and not in accordance with the accepted and usual course of judicial procedure. We have pointed out that this is not so (Br. p. 23, *supra*). It reversed the judgment below because a finding essential to justify the damages awarded was not based upon competent evidence. None of the cases relied on by Petitioner holds that a litigant under such circumstances is entitled to have a judgment (erroneously excessive in amount) affirmed because under some other remedy that the litigant might have had he would have been entitled to judgment in a lesser amount. The Court of Appeals did not, expressly or impliedly, deny appropriate relief on facts pleaded and proved, either because of the caption or the prayer, nor does the opin-

ion "initiate a return" to the old rules of practice and procedure in the state courts. As a matter of fact, federal Rules 2, 8a and 54c are quite similar to the California state practice of code pleading that has been in existence since prior to 1872.[16]

By the 1872 Conformity Act (17 Stat. at large, p.

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[16] The Practice Act of California, adopted April 29, 1851 (Stats. 1951, pp. 51, 56, 73) was substantially re-enacted in the Code of Civil Procedure in 1872 with respect to the following sections:

Deering, Calif. Code of Civil Procedure:

"§307. There is in this state but one form of civil actions for the enforcement or protection of private rights and redress or prevention of private wrongs."

"§426. (Requisites of complaint). The complaint must contain:

"1. The title of the action, the name of the court and county, and, in municipal and justices' courts, the name of the city, town or judicial township, in which the action is brought; the names of the parties to the action;

"2. A statement of the facts constituting the cause of action, in ordinary and concise language;

"3. A demand of the relief which the plaintiff claims. If the recovery of money or damages be demanded, the amount thereof must be stated; * * * "

"§427. The plaintiff may unite several causes of action in the same complaint, where they all arise out of:

"B. Claims arising out of the same transaction, or transactions connected with the same subject of action, and not included within one of the foregoing subdivisions of this section."

Causes in contract and in tort may, therefore, be joined. *Blodgett v. Trumbull,* 83 C.A. 566, 257 Pac. 199.

"§580. The relief granted to the plaintiff, if there

197) Sec. 5 made the practice, pleadings and forms and modes of proceeding in other than equity and admiralty causes in federal courts conform to the state practice.

Reason III.

Petitioner contends that the decision of the Court of Appeals with respect to the Bank's appeal is erroneous. This contention will be discussed in the respondent Bank's brief.

CONCLUSION

It is respectfully submitted that the Court of Appeals has correctly applied the local law of California and has done so in conformity with the federal statutes and rules of civil procedure; that the reasons urged in the petition for writ of certiorari are without foundation, and that the petition should be denied.

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be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case, the court may grant him any relief consistent with the case made by the complaint and embraced within the issue."